given a general sentence of two years and a committed fine of $1,000 under Counts I, II, III, V, VI, VII, VIII and IX, and a general sentence of two years, to be served concurrently, and a committed fine of $2,000 on the remaining counts. Jeffords received a sentence of 18 months and a committed fine of $1,500, and Fred Isaacs was sentenced for a period of one year and one day, and given a committed fine of $2,500. Additionally, appellants Ossanna and Harry Isaacs were each ordered to pay one-half of the costs of prosecution.

Common to all of the appellants is the broad contention properly preserved and protected by the record, that, as a matter of law, the evidence was insufficient to sustain the verdicts and the judgments entered thereon. It should be pointed out, however, that no question is raised or presented as to the sufficiency of the evidence to establish that the mails and wire were used for the purpose of executing the scheme to defraud. The sufficiency of evidence contention is focused upon two key issues: one, whether there was *fraud practiced* in the disposition of the Company's property to its loss and detriment; and two, was such fraud the result of a single, overall scheme and plan as contended by the Government, or were there a number of independent, isolated and unrelated schemes to defraud as urged by the appellants. The contention of the appellants requires a rather detailed review of the evidence; however, such review will be in the light most favorable to the Government because our chief concern is not whether there was evidence from which the jury could have acquitted the appellants but whether there was substantial evidence to sustain the jury's finding of fraud and the existence of an overall scheme to defraud as alleged in the indictments. Of course, as was pointed out by the trial court, if each

appellant was privately engaged in his own bit of fraud and there was no common scheme, then appellants would prevail, for the convictions depended upon proof of joint action and a common purpose.

The scope, magnitude and extent of our task may be appreciated in light of the fact that the trial commenced on April 18, 1960, and proceeded without undue interruption to August 6, 1960, when verdicts were returned; that 150 witnesses testified; that the exhibits are many and voluminous and that 72 volumes of transcript of more than 11,000 pages have been filed as the record;[9] that the court's charge, following extensive argument by counsel for defendants[10] was so comprehensive and exhaustive that the entire day of August 1, 1960 (from 9:30 a. m. to 5:30 p. m.) was required and consumed in delivering the same, and that the jury deliberated without interruption until August 6, 1960, when the verdicts were returned.[11] Interestingly enough, the principal dispute between the Government and appellants stems not from a disagreement as to the pertinent facts and circumstances, but rather from the conclusions and interpretations to be drawn therefrom.

Preliminarily we recognize that the forms of fraud are as multifarious as human ingenuity can devise; that courts consider it difficult, if not impossible, to formulate an exact, definite and all-inclusive definition thereof; and that each case must be determined on its own facts. In general,

9 Although numerous witnesses and exhibits were offered on behalf of defendants, none of them personally testified.

10 Harry and Fred Isaacs were represented by the same counsel, and each of the remaining defendants was represented by counsel of his own selection.

11 Pursuant to our Rule 8(i) we have reviewed this case upon the original papers and the typewritten transcript of the evidence and proceedings at trial.

and in its generic sense, fraud comprises all acts, conduct, omissions and concealment involving breach of a legal or equitable duty and resulting in damage to another. 37 C.J.S. Fraud § 1. For various definitions of fraud found in pronouncements by the courts, see 23 Am. Jur. Fraud and Deceit, § 2.

SCRAP TRANSACTIONS

A large portion of the trial was consumed in developing the methods and procedures adopted in the disposition of scrap property, having a very substantial value. This property has been placed in several categories referred to as "track and overhead scrap," "miscellaneous scrap" and "underground cable." Shortly after the Ossanna group assumed control of the Company, Towey was placed in charge of the sale of scrap. He was relieved of this responsibility and was replaced by Larrick, when the latter was employed by the Company, and thereafter the bulk of the scrap transactions was under the control and domination of Ossanna and Larrick as representatives of the Company, and Harry Isaacs and Fred Isaacs on behalf of American Iron, the recipient of the major portion of the scrap.

We have reviewed the entire record with painstaking care and have no difficulty in reaching the conclusion that there was substantial evidence from which the jury could find that the course pursued in disposing of the scrap was permeated with fraud. Indeed, counsel for the Isaacses, with commendable frankness, stated in oral argument before this Court: "[A]nd may I say preliminarily, speaking for the appellants that I represent, Fred Isaacs and Harry Isaacs, we raise no question as to the sufficiency of the evidence to sustain a finding of fraud as to the separate

transaction in which they engaged, the scrap transaction, senting the Company because of the loose method of haner than alleged as a part of a single overall scheme or conspiracy."[12]

There were numerous devices and devious methods employed to effectuate the fraudulent scrap transactions over the period beginning in mid 1951 and extending to August, 1955.[13] For the present, a summary thereof will suffice:

(a) At the direction of Ossanna and Larrick, adequate records and strict accounting procedures relating to the scrap accumulated and sold were discarded. The Company's auditors disapproved the procedures inaugurated by Ossanna and Larrick but with no avail, and ceased representing the Company because of the loose method of handling and disposing of the scrap.[14]

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12 In Larrick's brief this statement appears: "Larrick does not now raise the question of whether or not there would be sufficient evidence to warrant submission of the scrap transactions as against him, if done so under proper circumstances. It is with respect to the other transactions that the evidence is insufficient to warrant submission as against him."

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13 In October and November, 1957, scrap was disposed of for which the Company received $487.34, but for all practical purposes the scrap transactions ceased in September, 1955.

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14 Under date of February 27, 1952, the auditors in a letter to Ossanna as president, stated inter alia:

> "A second and possibly stronger objection to the proposed method is that it would mean the complete abandonment of accounting control of scrap between the time that it is accumulated and the time it is sold. The value of scrap in inventory has been relatively large at some times during the course of the years; certainly one would not consider abandonment of accounting control over a similar amount of cash. This accounting control has two practical applications. In the absence of accounting control, the responsible officers have little basis for assuring themselves that proper amounts are received for sales of scrap. Also, the absence of accounting control may well lead to absence of physical control. * * *The proposed method exposes the companies to greater danger of loss through stealing."

In a letter under date of November 10, 1952, the auditors advised Ossanna that because of the weaknesses in the accounting records of the Company, they were unable to satisfy themselves as to the correctness of the financial statements and did not wish to continue as auditors.

(b) After American Iron began acquiring overhead scrap from the Company, Ossanna and Larrick issued directions to subordinates to discontinue effective control of the scrap disposed of. Thus, in September, 1952, Larrick instructed Walter Larson, purchasing agent of the Company, "From here on out, I don't want you to keep track of any scrap at all. Forget about it. Don't weigh it. Don't keep track of the trucks that come in to haul it away or attempt to price it. Just forget about it. We will take care of that up at the office, 11th Street."

(c) The removal by American Iron of scrap was initiated pursuant to a letter agreement consummated in August, 1951, under which American Iron agreed to "take up all rail, scrap, overhead lines and poles of abandoned streetcar lines without cost to Company, their compensation being the salvage value of the material taken up. They also agree, in taking up the rail, to back-fill to the street level and to repave wherever necessary." At the insistence of the auditors, a contract was entered into under date of February 11, 1952, providing that American Iron should remove tracks, overhead wires, poles, ties and other appurtenances along certain streets in Minneapolis; agreeing further to resurface and restore all portions of roadways and streets as required by city ordinances. As full compensation American Iron was to receive and retain all materials removed by it. It is undisputed, however, that steel rails were removed by American Iron from only one abandoned street and although it repaved this street, there was evidence from which the jury could find that the repaving costs were paid by the Company. The bulk of the rails removed by American Iron was from dirt streets where costly repaving was not required.

On August 13, 1952, an addendum was made to the original contract, including seven lines in St. Paul which were to be removed by American Iron. This addendum further provided that American Iron did not have the obligation to repave any of these streets.

(d) The authority of the Company to use the streets of Minneapolis for operation of its street railway system was derived from a franchise granted by the city. Thereunder the Company was obligated to pave, maintain, repair and improve that portion of the streets between the rails. During the progress of converting, the Company applied to the city for permission to discontinue the operation of streetcars on certain streets. Such discontinuance necessitated the removal of tracks, switches and other apparatus, and the repaving of many streets. After negotiations, and on October 30, 1953, the so-called conversion ordinance was adopted (in reality an agreement between the city and the Company) and which provided in part that the city would perform a substantial portion of the work incident to the removal of Company property from the streets, including the paving, repaving and resurfacing of streets over the rails and right-of-way where necessary. In consideration therefor, the Company obligated itself to pay to the city $10,000 per street mile, or a total of $922,790. Additionally, the Company was required to expend an amount not to exceed $300,000 for what is referred to as special work, and which involved in the main the removing of switches, mates, frogs, and other property from the streets. Under the contract of February 11, 1952, with American Iron, the latter was required to do and perform the work which was the subject of the conversion ordinance, and which required the expenditure on the part of the Company of more than $1,200,000. However, startling as it may seem, no ef-

fort was made by Ossanna or anyone on behalf of the Company to adjust the contract with American Iron or recover from it any part of the amount paid by the Company to the city. The conversion ordinance is just another circumstance which gives force to the Government's position, sustained by the jury, that the contract under which American Iron was purportedly operating was accorded lip service only and that even before the conversion ordinance, the Isaacses, with the approval of Ossanna and Larrick, were doing an effective job of defrauding the Company of property in substantial portions.

(e) Under date of July 30, 1952, Lynn G. Barnes, then vice-president and general manager of the Company, advised Ossanna that the value of the underground scrap, consisting in the main of copper wire encased in lead cables, was in excess of $1,000,000 and could be removed at a cost of approximately $50,000.[15] A suggestion from Barnes that the Company remove and sell the cable was ignored by Ossanna who, on January 2, 1953, entered into a second addendum to the February 11, 1952 contract with American Iron. This addendum was interpreted by American Iron as conferring upon it the absolute right to receive and retain all underground cable in consideration for its services in removing the same. It stands undisputed, however, that none of the cable was removed by American Iron. Instead, employees of the Company performed this operation and placed the cable in appropriate lengths on the streets, where it was picked up by American Iron. The scrap was weighed on scales of American Iron and false weight tickets were prepared by its employees at the in-

15 Barnes resigned from the Company shortly after that date and in September, 1952, became vice-president and general manager of Omaha Transit Company and has been president of that Company since 1955.

stance and direction of Fred Isaacs or Landy.[16] Contrary to instructions from Larrick, employees of the Company who participated in the removal of the underground cable made and retained records disclosing the amount of cable actually removed and delivered to American Iron. This information was furnished to Government agents, who were able therefrom to calculate the total amount of cable in pounds that had been removed and to demonstrate the difference between the value of cable actually acquired by American Iron and the amount paid by the latter to the Company, based upon the false and fictitious weights. From exhibits prepared by the Government agents, it appears that whereas the estimated market value of cable received by American Iron was approximately $938,000, the Company received only $123,000.

In an effort to offset the overwhelming evidence of fraud found in the falsification of the weight tickets, appellants took the position in the trial court that American Iron did not purchase the underground cable; that under the contract (second addendum) it was entitled to the cable for its labor and expense incident to removal thereof, and that the amount paid to the Company represented an adjustment of labor costs. We agree with Judge Nordbye's conclusion, expressed in his opinion denying after-trial motions, that this "contention * * * is simply incredible in view of the conduct of the parties."

16 After American Iron employees had prepared the weight tickets they were changed and falsified by erasing the original weights and inserting lower weights (on an average these lower weights were 20% of the actual weights). In some cases the original tickets were discarded and new false weight tickets prepared. These false weight tickets were then sent to Larrick, who prepared invoices without prices, which were sent to American Iron, who inserted the prices and calculated the amount it would pay the Company.

This transaction, found by the jury to be a part of the scheme and artifice to defraud, culminated in the Company paying $238,349.73 to one George A. Francis.

James A. Quint, engaged in the business of exporting, importing and advertising, was authorized by Larrick to sell streetcars of the Company rendered surplus by the conversion program. Negotiations led to a sale of 91 P.C.C. streetcars to Servicio de Transportes Electricoes, the transit system in Mexico City, Mexico. The sales contract, dated September 4, 1953, provided for a cash payment of $327,541.68, or 20% of the sales price, and payment of the balance of $910,320 in 10 equal semi-annual installments, as evidenced by 10 promissory notes in the amount of $91,032 each, maturing as follows: the first on June 1, 1954 and one each 6 months thereafter, the last becoming due December 1, 1958. While the contract was dated September 4, 1953, the notes were dated December 1, 1953 and bore interest from that date at 4% per annum. There was a further contractual provision that purchaser had the right to take up the first two notes maturing June 1, 1954, and December 1, 1954, at a discount of 9% upon delivery of the cars to purchaser. The notes were guaranteed by Nacional Financiera S. A., a Mexican agency, stated by a banker witness to be a "Mexican Government entity that covers the financing of the purchases by various Mexican Government agencies—practically everything Mexico buys is guaranteed by the Nacional Financiera." Another banker witness likened the agency to the "equivalent of the Reconstruction Finance Corporation of the United States."

Prior to the consummation of the sale of the streetcars,

Ossanna had informed the executive committee of the Company that "the outstanding feature of this deal is that the cars were sold on a contract basis, running for four years, payment being guaranteed by the Bank of Mexico and the Transportes Bank of Mexico." And at the annual meeting of the shareholders of the Company on March 8, 1954, in reporting the sale of the streetcars, Ossanna stated: "We sold them on time and after considerable negotiation, the Bank of Mexico, which is the same as our Federal Reserve Bank in this country, guaranteed payment, and we think we are perfectly safe and we were paid a portion of the amount [of] each car as shipped; the last one was shipped last Friday."

Other evidence discloses that the solvency and soundness of Nacional Financiera had been brought home to Ossanna and Larrick. Thus, in August, 1954, Larrick had obtained information from the Hanover Bank in New York indicating that that institution had extended a line of credit to Nacional Financiera of ten to twelve million dollars; information had been furnished by the foreign department of Northwestern National Bank of Minneapolis attesting to the soundness of the notes; and in accordance with the contract for sale, the Company, on June 11, 1954, received $88,026.06 for each of the first two notes maturing on June 1 and September 1, 1954, representing the face amount thereof, less the 9% discount.

Other parties demonstrated considerable interest in disposing of the notes, although how they acquired knowledge of the Company's position in that regard is not made clear. In the fall of 1953, which was before the issuance of the notes, Harry Bloom, brother of defendant Blumenfield, is found on the scene discussing with one Salk, a Chi-

cago mortgage banker, possible sale of the notes at a discount. Salk desired more information, and in April, 1954, was advised by Larrick that the notes were sound as an investment. Nothing of concrete form was done by Salk toward purchase of the notes, although Bloom endeavored as late as August, 1954, to persuade Salk to purchase these assets.

On October 6, 1954, Robert Levitt, who had been Blumenfield's attorney for many years, advised Ossanna that he was interested in securing an option to buy the notes at a discount of 40% for out-of-town principals whom he represented. (Two of these principals were Blumenfield and Bloom—others were not named). The option was granted by Ossanna on October 11, 1954, and remained in force until November 1, 1954, when Levitt advised Ossanna that the option was being dropped as it involved too much risk. Levitt testified that he surrendered the option because Northwestern National Bank of Minneapolis had informed him that it was not familiar with Nacional Financiera, guarantor of the notes. However, the Government offered evidence establishing that as early as March, 1954, Levitt had been informed by Northwestern Bank that Nacional Financiera met its obligations "with very satisfactory punctuality."

Blumenfield re-entered the picture in February, 1955, when he took Ossanna to Miami, Florida, to meet with one Sam Kay. The latter offered to buy the notes at a 40% discount. Ossanna assisted in the preparation of the offer which was accompanied by Kay's check for $50,000. This offer was of short duration. On March 14, 1955, Ossanna returned Kay's check and informed him that a prior option held by another party had been exercised. Apparently this reference was to George A. Francis.

It appears that Francis made his entry into the picture in November 1954, and shortly after Levitt had dropped his option. Having received two offers to purchase the notes at a discount of 40% (both coming directly or indirectly from Blumenfeld or his associates), Ossanna informed the board of directors of the Company on November 16, 1954, that there were firms in New York and Chicago that would not take the notes at this discount, and stated: "The danger to us, as in Brazil, is that Mexico can have a change of Government over night and their word wouldn't be worth a nickel." During the same meeting the board adopted a motion offered by Ossanna that "we put through our bank for collection and payment in American dollars the eight notes of Servicio de Transportes Electricoes for purchase by George Francis, of Mexico City, Mexico, at 40% discount, as offered by him * * *." On the same day Ossanna wrote Francis that the board had accepted his offer to purchase the notes at a 40% discount. However, there was no evidence showing when or where Francis made such an offer. The Government did introduce a letter purportedly written by George A. Francis to "Secretary to the Office of President of the Republic" under date of October 7, 1954, in which he stated that "the holders of * ** * promissory notes want the Nacional Financiera, S.A. to discount them and in this case, the latter institution will receive the 4% interest designated in favor of the beneficiary. * * *."[17]

On March 16, 1955, the board of directors of Minneapolis Street Railway Company adopted a resolution providing that "this corporation sell to the Hanover Bank, without recourse, all the rights, title, * * * in and to the

17 The effect of this offer is not made clear to us from other portions of the letter or record.

above described notes and joins with the St. Paul City Railway Company in selling and discounting said notes to the Hanover Bank for a total price equal to 92% of face value, plus 100% of unpaid and accrued interest."[18] On April 8, 1955, the four first maturing notes were sent to Northwestern National Bank with instructions to forward them to Hanover Bank for discounting at 92% of face value. These instructions were carried out. Hanover Bank paid $351,079.25 for these notes and credited this amount to Northwestern National Bank for the benefit of the Company. The Hanover Bank held the notes until their maturity dates, when they were paid in full.

On April 15, 1955, Ossanna sent [a] check to Lewis & McDonald, attorneys of New York, for $5,000, representing their brokerage fee for handling sale of the four notes. On the same day two certified checks were issued payable to George Francis, one in the sum of $15,000, the other for $96,438.24. These checks were authorized by either Ossanna or Larrick, or both, and a notation appeared thereon that they were in payment of commission on sale of the notes.

The remaining four notes were handled differently. On July 26, 1955, they were sent by Ossanna to Northwestern National Bank with instructions to forward them to Banco de Commercio in Mexico City for delivery to Nacional Financiera upon payment by the latter of the sum equal to 87% of the face value, plus 4% accrued interest thereon. Apparently there was a change in instructions to the Northwestern National Bank as we find it later directed Banco de Commercio to pay to George Francis out of the

18 As previously stated, these corporations are subsidiaries of the parent company. Apparently they owned the streetcars and the notes ran in their favor.

proceeds of collection, an amount not to exceed $61,500. This was done, and on August 6, 1955, Northwestern National Bank received a draft in the amount of $323,585.59 representing the face amount of the notes, plus interest, less $61,500 paid to Francis.[19]

On August 10, 1955, a Company check in the amount of $83,316.31 was drawn to the order of George Francis, with requisition attached thereto as follows: "Deliver the following to, mail to George Francis, c/o Jose Leal, 605 S. W. 9th Avenue, Miami, Florida," and bore the approval of Ossanna and Larrick, and stated that it was in full of "any and all commissions and/or discount." On September 23, 1955, another check in the sum of $834.89 was drawn in favor of George A. Francis, covering "balance commission sale of last four notes * * *." Thus out of the proceeds of the sale of the eight notes, George Francis received $238,349.73.

Although a subpoena had been issued for George A. Francis, he did not appear and, of course, did not testify. The Government was able, however, to prove that on August 18, 1955, a bank account was opened in the name of George A. Francis in a bank in Miami, the deposit being $83,316.31, and that on August 24, 1955, $53,000 in cash was withdrawn from that account.

In the face of the foregoing facts and circumstances, appellants, and particularly Ossanna and Larrick, advance the argument that the only conclusion that can be drawn

19 The covering letter from Banco de Commercio to Northwestern National Bank referred to a receipt from Francis, which actually was in the form of a letter purportedly written by Francis to Banco de Commercio, stating, inter alia: "In accordance with the instructions of the mentioned Bank (Northwestern National) have gave to me from your collection the amount of $61,500 U.S. * * *." The letter states further that "Amount for liquidation of the interests of the Financiera S.A." was $18,739.71, thus indicating that Francis' net was $42,760.29.

by reasonable men is that the course of conduct pursued in the disposition of the notes is invulnerable to a successful charge of fraud; that what was done was legal, proper and legitimate. We are not at all impressed with the urgency of this contention. While a casual and superficial consideration of the various attending circumstances may indicate some basis for the claim of legitimate fair dealing, when the searchlight of truth is focused on the transaction from beginning to end and the numerous ramifications thereof, we have no difficulty in finding a factual basis for the conclusion, obviously reached by the jury and shared in by the trial court, that a substantial amount of the Company's property was diverted from it and obtained by others not entitled thereto by fraudulent means. From our summary, it is made to appear that even before the notes were executed certain defendants and their close associates were maneuvering to dispose of them for a greatly reduced price. Later Ossanna granted two options, one to the attorney for Blumenfield, the other to Blumenfield's associate, for disposition of these assets at 60% of their face value. This was done notwithstanding Ossanna had vouched for the soundness of the notes on at least two prior occasions. While neither of the options was exercised, it is quite apparent that Ossanna utilized both offers very effectively by prevailing on the board of directors to authorize a sale of the notes to George A. Francis at a discount of 40%. The final chapter of this bizarre story is that although the board of directors authorized the sale of the notes to Francis, he did not in fact buy any of them. Neither is the evidence at all sufficient to satisfy reasonable men that Francis rendered any services beneficial to the Company in the disposition of the notes.

HOPKINS-RIGHT-OF-WAY

In 1951 the Company abandoned the streetcar line that ran from the city limits of Minneapolis (France Avenue) to Central Avenue in the City of Hopkins, Minnesota, leaving for disposal the right-of-way, the overall length of which was 3.6 miles. For a distance of 1.25 miles this strip of land was 66 feet wide and the remainder was 100 feet wide. Record title was held by Minneapolis and St. Paul Suburban Railroad Company, one of the subsidiaries of the parent company. It was the Government's position, and the indictment alleged, that "It was a part of said scheme and artifice that properties of the Transit Companies, including part of that known as the Hopkins Right-of-Way * * * would be transferred by the Transit Companies for a grossly inadequate consideration and to and through one Walter N. Carlson and for his benefit and the benefit of the defendant's associates and of their nominees, including Fred Ossanna, Jr. and Mrs. M. A. Stirton, a daughter of defendant Fred A. Ossanna, and of Shady Oaks Realty Co., and of others to the grand jury unknown."

The following facts with respect to this property were developed by the evidence. At the request of appellant Ossanna, one Brancheau, an experienced real estate dealer and appraiser in Minneapolis, submitted an appraisal on September 1, 1951, which divided the right-of-way into four sections, aggregating $84,500.[20] Additionally several members of the Minneapolis Real Estate Board made an appraisal of the portion of the right-of-way from Brookside

20 A small section extending about a block at the city limits of Minneapolis, having commercial value, was appraised at $9,000; the portion of the strip which extended 1.25 miles, being 66 feet wide, was appraised at $15,500; the portion that extended from Woodale Avenue to Brookside Station, being 100 feet wide, was appraised at $23,000, and the remainder at $37,000.

Station to Central Avenue, and fixed the value at $40,550. (This same section had been appraised by Brancheau at $37,000). It was also made to appear that shortly after this property became surplus the Company determined the value of the entire strip for selling purposes to be approximately $98,000.[21]

The municipalities and political subdivisions (hereinafter referred to as municipalities), some six in number, through which the right-of-way ran, formed a committee for the purpose of purchasing the same for use as a thoroughfare into Minneapolis. This committee functioned through or in conjunction with the Board of Hennepin County Commissioners (Board). Under date of May 15, 1952, the Board by letter directed to the attention of Ossanna, offered to pay $56,500 for the entire right-of-way. A meeting between representatives of the interested municipalities and representatives of the Company, the latter including Ossanna, was held on May 19, 1952, during which "Mr. Ossanna informed the committee that he could not recommend to the board of directors of this Company the sale of the right-of-way at such a low figure" [$56,500]. Thereafter, on July 1, 1952, the Board made a written offer to purchase that part of the right-of-way from Brookside Station to a point in Hopkins for $75,000.[22] By letter of July 7, 1952, Ossanna accepted this offer, in which he also stated: "Our previously stated offer to sell this right-of-way, as contained in our letter dated April 22, 1952, at a price of $98,500 was, in our considered opin-

21 Daniel J. Bren, who was assistant to the president in 1951, testified: "We established a price on the right-of-way from France Avenue to Hopkins of approximately $98,000."

22 From plats of the right-of-way it would appear that this portion constituted more than half of the entire strip.

ion, a very low price * * *." Thereafter, on October 15, 1952, a contract was entered into between the record title holder of a portion of the property involved and the City of Hopkins, which granted the city an option to purchase the same for $75,000.[23] This option was renewed from time to time until the summer of 1953. On July 9, 1953, in a letter directed to "Chairman Right-of-Way Purchase Committee" Ossanna offered to sell the remainder of the right-of-way (France Avenue to Brookside Station) for "cash consideration of $75,000." This latter offer was not accepted, the Hopkins option was never exercised, and negotiations with the municipalities ceased in September, 1953.[24]

Apparently no further action was taken with regard to disposition of this property until September 13, 1954, when the board of directors of the Company authorized Ossanna and Towey to effect the sale of the right-of-way "on the best possible basis before taxes became due." The next event of consequence occurred on May 6, 1955, when at a special meeting of the board of directors Ossanna reported that the "Hopkins right-of-way had been agreed to be sold to W. N. Carlson for the sum of $10,000, we to pay the back taxes and give proper deed." On the same date a deed conveying the property was executed by Towey and Ossanna.

The record discloses that shortly after Carlson acquired the property, appellant Jeffords entered upon the scene. He acquired an option to purchase a small portion of the

23 Although all prior dealings for purchase of the property had been on behalf of the six municipalities, it will be noted that the option was only with the City of Hopkins.

24 Thus we see that Ossanna had placed a value of $150,000 on the entire right-of-way.

right-of-way from Carlson for $6,000 and paid $3,000 with the execution of the option contract. On November 25, 1955, the option contract was modified whereby Jeffords released a portion of the property under option in consideration of the payment to him of $8,000. (This was accomplished by the forgiveness of $3,000 under the original option and a payment of $5,000 over and above that). The net result of the modification was that Jeffords acquired a lot and $2,000 in cash from Carlson. Jeffords later sold the property for $12,000, thus realizing a profit on the whole transaction of $14,000.

Shortly after Carlson acquired the property he entered into an agreement with Fred Ossanna, Jr. and Margaret Stirton, son and daughter of appellant Ossanna, under which they were to share "fifty-fifty" in the profits derived from the sale of the real estate. Thereafter and through the efforts of a real estate company, and during the years 1955, 1956 and 1957, Carlson sold the remainder of the Hopkins right-of-way for a total of $126,075.56.[25] Carlson paid to Fred A. Ossanna, Jr. and Margaret Stirton, the following amounts:

Date	Name	Amount
April 25, 1956	Fred A. Ossanna, Jr.	$15,000.00
April 25, 1956	M. A. Stirton	15,000.00
December 19, 1956	M. A. Stirton	5,000.00
December 19, 1956	Fred A. Ossanna, Jr.	5,000.00
July 16, 1957	M. A. Stirton	6,000.00
July 16, 1957	Fred A. Ossanna, Jr.	6,000.00
	Total	$52,000.00

The $15,000 check to Fred A. Ossanna, Jr. was endorsed

25 Apparently the net amount realized by Carlson, after deducting expenses incident to sales, was $90,533.92.

payable to an Ossanna owned Company, and the $15,000 check to Margaret Stirton was endorsed payable to appellant Ossanna.[26]

It should also be stated that appellant Ossanna was active in negotiations carried on for sale of the property after it was acquired by Carlson. The latter informed the realtor who was handling the sales that Ossanna was Carlson's counsel, and the realtor was directed to consult with Ossanna when Carlson was not available. Copies of correspondence from the realtor to Carlson were sent to Ossanna.

From the foregoing chain of circumstances established by undisputed evidence, we have no difficulty in concluding that there was substantial evidence to support a finding that the transaction was motivated by fraud and not as a result of an honest desire to protect the interests of the Company. As was true with regard to disposition of the Mexican notes, there were negotiations which facially indicated legitimacy but when the ultimate result is considered, the shell of fair dealing is pierced, and the true intent and purpose of the main participants is revealed. There simply is no logical explanation for disposition of property appraised at $84,500, valued by Ossanna at $98,500 and $150,000, being sold for $10,000, so that the purchaser was enabled to reap a profit of nearly one thousand per cent, and one of the appellants, who unquestionably dominated and controlled the entire situation insofar as the Company was concerned, being the recipient directly or indirectly of $52,000.

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26 Evidence was offered by appellants to show that the sum of $52,000 was paid to reduce indebtedness of Fred A. Ossanna, Jr. to Shady Oaks Realty Company, a corporation owned by the Ossanna family, and indebtedness of Margaret A. Stirton to appellant Ossanna.

JEFFORDS' COMMISSIONS

This facet of the scheme involves the sum of $107,500 paid to appellant Earl A. Jeffords, who was a licensed real estate broker, doing business as J & C Holding Company. As we shall presently see, four checks totaling that sum were issued in payment of commissions purportedly due Jeffords in connection with the sale of three different parcels of real estate which had become surplus property. The controverted issue resolved in favor of the Government is whether Jeffords was legally entitled to the commissions as urged by him, or whether, as contended by the Government, the payments were wholly without consideration and constituted a part of the scheme and artifice to defraud the Company.

On July 6, 1954, a requisition signed by Larrick and Ossanna, initialed by Towey, directed the issuance of the Company's check to Jeffords in the sum of $12,500 "covering commission on power plant in excess of $1,250,000." Jeffords asserted that he was the procuring cause for sale of the power plant to Northern States Power Co. and consequently was entitled to the commission. The Government's position was exactly to the contrary. Our review and analysis of the record convinces that there was substantial evidence to support the Government's position. Indeed, the official minutes of the Company plainly established that Ossanna was given credit for disposing of the property through his sole efforts.[27]

The Company's Currie Avenue property was sold to the City of Minneapolis in November, 1954, for $200,000. On the day before the sale was authorized by formal action of

27 In an interview with two agents of the Internal Revenue Service, Ossanna stated that he had personally sold the power plant to the Northern States Power Co. for $1,250,000.

the board of directors, Jeffords made a demand for $20,000 commission in accordance with an exclusive sales contract. However, the contract so relied on was not produced by Jeffords then or at any time during the trial. He did not claim to be the procuring cause for sale of the property. In the evidence, which is substantial in nature, we find facts and circumstances clearly supporting the conclusion that Jeffords' claim of an exclusive contract was entirely fictional and not based on fact.

The Company owned an improved tract of approximately 27 acres at University and Snelling Avenues, St. Paul, Minnesota, that was sold in January, 1955, for $1,500,000, less depreciation and adjustments, the amount actually received by the Company being $1,334,504. One Paul Villaume, a distant relative of Ossanna, was a real estate dealer and procured the purchaser for this property. He was paid a commission of $37,500, being 2½% of the gross sales price.[28]

At meetings of the board of directors of the company (September 14 and 17, and December 30, 1954), the only commission discussed in connection with the sale was that due Villaume. Indeed, at the September 17 meeting, Ossanna assured the board there would be no additional commissions paid in connection with the sale. As late as January 14, 1955, in seeking release of the lien of the mortgage on the property, Ossanna and Towey certified to the Northwestern National Bank that the broker's commission was $37,500. On that day Villaume submitted his

28 Shortly after receiving the commission, Villaume gave $7,500 thereof to the Ossanna Foundation. The Government's theory was that as a part of the scheme and artifice to defraud, the Company paid in the form of a commission $7,500 more than it was obligated to pay to Villaume. This payment was the subject of Counts XII and XIII of the indictment. As we have seen, the court dismissed Count XIII and the jury acquitted on Count XII.

bill, and on January 17, 1955, pursuant to requisition signed by Ossanna, check was sent to Villaume for $37,500. Notwithstanding the prior assurances with respect to the amount of commission that would be paid, we find that on authorization of Ossanna, Larrick and Towey, Jeffords was paid $75,000 under the guise of a commission. This payment was in two checks, the first dated January 25, 1955, in the amount of $35,000, and the second under date of February 16, 1955, in the amount of $40,000. To afford justification for the payment of the $75,000, reliance was based on a contract which on its face gave Jeffords' company (J & C Holding Company) the exclusive right to sell the property "for one year from this date—April 15, 1954, to April 15, 1955" and under which the Company was obligated to pay to him a commission of 5% of the total sale price. This document was signed by Ossanna and Towey as president and secretary of the Company. To further justify the payment, and as authority for the purported contract, appellants rely upon action of the executive committee of the Company, as disclosed by minutes of the meeting of that committee supposedly held on April 12, 1954.[29] The evidence conclusively and convincingly established that the minutes were not prepared on the date of the indicated meeting but were in fact prepared and inserted in the minute book in the early part of 1955. The inference is quite clear that they were prepared at about the time the

29 These minutes recited in part: "There was presented to the Committee request for exclusive option on the sale of the company property at Snelling and University Avenues. This was made by the J & C Holding Company, real estate dealers at 1321 Nicollet Avenue. * * *On motion by Mr. Larrick, seconded by Mr. Aune, it was moved that the Executive Committee * * *instruct its officers to grant exclusive right of sale contract to the J & C Holding Company * * * for a period of ten months from April 15, 1954, on a commission basis of 5% * * *. In case of the sale of the property by J & C Holding Company, or any other sales agency, commission of 5% is to be paid * * *in two equal installments, not less than 30 days apart."

sale was made and the payment sent to Jeffords. Appellants contend that even though the minutes were prepared at a later date, the meeting was nonetheless held on April 12, 1954, and the minutes truly reflect the action taken. At best, this was a question of fact to be resolved by the jury, which had before it evidence of unusual circumstances, which, in our judgment, may properly be characterized as badges of fraud. The entire transaction gives basis for the conclusion that the preparation of the minutes, as well as the purported contract—were in fact fraudulent transactions—designed to give the appearance of legality.

While there was no direct evidence of kick-backs from Jeffords, his disposition of the $107,500 was revealed and proved interesting, if not significant. The commission of $12,500 (power plant) was deposited on July 17, 1954, and at the same time Jeffords withdrew $11,500 in cash. The $20,000 received in connection with the Currie Avenue property was deposited on November 18, 1954, and on the same date Jeffords withdrew $15,000 in cash. When the $35,000 was deposited, Jeffords withdrew $25,000 in cash and when he deposited the $40,000 he withdrew $30,000 in cash. He claimed in a statement to an agent of the Internal Revenue Service that after the latter two withdrawals he departed for Florida with the greater portion of $55,000 in the back of his automobile, with the intention of purchasing real estate but that he lost the entire amount betting on horses at races he attended in Florida.

TOWEY LOTS

As previously stated, James A. Towey was not tried because of illness. He was an active participant in this transaction which concededly resulted in a loss to the Company.

Since none of the appellants questions the sufficiency of the evidence to establish fraud in the disposition of this property, our review of the facts is limited to those which stand out in bold relief.[30]

In the early part of 1954 and in the presence of two employees of the Company and Towey, Larrick offered to sell certain lots along the Harriet Right-of-Way for $500. Towey accepted the offer, paid $500 to the Company and at his direction a deed dated March 1, 1954, was executed whereby the record title was conveyed to Bernard Heintz, an uncle of Towey. Heintz testified he knew nothing about the transaction. Approximately six months later Towey sold the lots for $5,500 and caused his uncle to execute a deed to the purchasers. The sale became the subject of a hearing before the Railroad and Warehouse Commission of the State of Minnesota in 1958. There is evidence that shortly thereafter Towey paid additional money to the Company. The suggestion in the briefs of appellants that the payment was in connection with the lots does not find support in the record. In any event, the evidence supports a finding that this transaction was the result of rank fraud, participated in not only by Larrick, who set the stage, but also by Ossanna, who, at a meeting of the board of directors of the Company, made the motion whereby the board was persuaded to approve the sale to Towey.

The foregoing summary of the evidence and our conclusions should suffice to dispose of the first issue—the sufficiency of the evidence to support the finding of fraudulent conduct in the disposition of the company's property which was the subject of the transactions we have reviewed.

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30 In his brief Larrick states: "No one would contend that the defendant Towey, masquerading as Bernard Heintz, in reselling this property to the Heutmakers, did not profit thereby and did not defraud the Transit Company."

This brings us to the key issue—was the fraudulent conduct the result of a single, overall scheme to defraud? Here, it is strenuously insisted that there is no evidence affording proof that appellants, particularly Larrick, Harry Isaacs, Fred Isaacs and Jeffords, knowingly joined, adhered to, and participated in a single scheme to defraud. Hence it is claimed that in light of *Kotteakos v. United States*, 328 U.S. 750, substantial prejudice resulted from a trial *en masse* of all appellants with acts of one being admitted against others.

The instant question is not new to the courts. Out of numerous cases general principles have evolved which have application here:

A fraudulent scheme and conspiracy may be and usually is established by circumstantial evidence; by inferences from the evidence of relationship of the parties and by overt acts, conduct and other probative circumstances. *Marbs* v. *United States*, 8 Cir., 250 F.2d 514, 522, 523, cert. den. sub nom. *Sarkis* v. *United States*, 356 U.S. 919; *Marx* v. *United States*, 8 Cir., 86 F.2d 245, 250; *Phelps* v. *United States*, 8 Cir., 160 F.2d 858, 867, cert. den. sub nom. *Peters* v. *United States*, 334 U.S. 860; *Madsen* v. *United States*, 10 Cir., 165 F.2d 507, 511. "Conspirators ordinarily do not announce that they have joined their efforts for the purpose of engaging in or furthering some unlawful scheme or plan—rather they are inclined to cover their machinations, thereby casting upon the prosecution the burden, sometimes difficult, of establishing the conspiracy, and the overt acts in consequence thereof, by circumstantial evidence,—by actions of the conspirators." *Blumenfield* v. *United States*, 8 Cir., 284 F.2d 46, 53, 54, cert. den. 365 U.S. 812.

"Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.' " *Glasser* v. *United States*, 315 U.S. 60, at p. 80; where the evidence affords satisfactory proof that a conspiracy has been formed, "but slight evidence connecting a defendant therewith may still be substantial, and if so, sufficient." *Galatas* v. *United States*, 8 Cir., 80 F.2d 15, 24, cert. den. 297 U.S. 711; *McDonald* v. *United States*, 8 Cir., 89 F.2d 128, 138, 139, cert. den. 301 U.S. 697; *Marx* v. *United States*, supra, 86 F.2d 245, at p. 250. As pertinently stated by this Court in *Phelps* v. *United States*, supra, 160 F.2d 858, at p. 867: "Once there is satisfactory proof that a conspiracy has been formed, the question of a particular defendant's connection with it may be merely a matter of whether the stick fits so natural into position in the fagot as to convince that it is part of it." Cf. *United States* v. *Cohen*, 3 Cir., 197 F.2d 26, 29; *Nye & Nissen* v. *United States*, 9 Cir., 168 F.2d 846, 852, aff'd 336 U.S. 613; *Meyers* v. *United States*, 6 Cir., 94 F.2d 433, cert. den. 304 U.S. 583.

It is not necessary to support a finding of the existence of an overall scheme or conspiracy that each participant knew others involved therein or the precise part each was playing. *Lefco* v. *United States*, 3 Cir., 74 F.2d 66, 68, 69.

> "* * * (I)t is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscovered and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are

> achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of corrolating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity." *Blumenthal* v. *United States*, 332 U.S. 539, at pp. 556, 557.

The substantive offenses proscribed by Title 18 U.S.C.A. §§ 1341 and 1343 (mail fraud and fraud by wire) are closely related to a conspiracy, proscribed by Title 18 U.S.C.A. § 371. The distinguishing feature is that the former may be conceived by one person, and the mails or wire must be used for purpose of executing the scheme, while a conspiracy requires an agreement of two or more to violate the law, and at least one overt act in furtherance of the conspiracy. In *Blue* v. *United States*, 6 Cir., 138 F.2d 351, 358, cert. den. 322 U.S. 736, the Court stated: "(w)hen a scheme to defraud is shared in by two or more, it becomes a conspiracy; the rules of evidence are the same as where a conspiracy is charged (*Robinson* v. *United States*, 9 Cir., 33 F.2d 238); and the act of each party in furthering the common scheme is the act of all."

Each participant in a scheme to defraud is responsible for the use of the mails and wire used to execute and carry out the scheme.

> " 'Where two or more persons jointly devise and execute a scheme to defraud by the use of the mails, they may thereby become in effect partners in the criminal purpose of so using the mails to defraud. If they do, the acts of each thereafter, during the exist-

> ence and execution of the scheme, done in furtherance of that execution, may become the acts of all the partners, and each may be convicted of the mailing of a letter which one of his partners caused to be mailed in the execution of the scheme.' " *Baker* v. *United States*, 8 Cir., 115 F.2d 533, 540, cert. den. 312 U.S. 692.

See also *Steiner* v. *United States*, 5 Cir., 134 F.2d 931, 934, cert. den. 319 U.S. 774.

By applying the foregoing principles we conclude that there was substantial evidence from which the jury could find: (1) the existence of an overall scheme to defraud; (2) that the transactions under scrutiny were a part of that scheme; (3) that the appellants with knowledge of its existence, adhered to and participated in the scheme devised by one or more of them; (4) that as participants in the scheme, and for the purpose of furthering and executing the same, Ossanna, Larrick and Harry Isaacs used the mails or wire, or both; (5) that by express or implied agreement, a conspiracy was formed to commit the substantive offenses of mail fraud and fraud by wire, and the appellants were parties to or joined such conspiracy.[31]

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31 Judge Nordbye submitted the issue of a single, overall scheme and a conspiracy to the jury as follows:

> "The first question, therefore, which you jurors will have to determine is whether the Government has established beyond a reasonable doubt the overall scheme or plan to defraud, and loot, so to speak, the Transit Company of property, real and personal, which would be available by reason of abandonment or non-use on account of the conversion of the Transit Company transportation facilities from streetcars to buses. * * *
>
> "The Government does not contend that these defendants got together at one time and planned a scheme to defraud the Transit Company. It is sufficient if the scheme to defraud as alleged was conceived in the minds of one or more of the defendants. If it was, and the other defendants, with knowledge of the scope of the scheme, knowingly and intentionally entered into and participated therein, then as to such defendant or defendants, they would be

In reaching this conclusion we have applied the principle universally recognized, that if the evidence viewed in light most favorable to the Government is such that reasonable minds "might differ" then the question becomes one of fact for the jury to resolve, and not one of law to be determined by the courts. See and compare *Brennan* v. *United States*, 8 Cir., 240 F.2d 253, 259, cert. den. 353 U.S. 931; *Connelly* v. *United States*, 8 Cir., 249 F.2d 576, 585, cert. den. 356 U.S. 921; *Northcraft* v. *United States*, 8 Cir., 271 F.2d 184, 187.

The existence of an overall scheme finds support in the scope and magnitude of the fraudulent conduct. It extended to a substantial portion of the Company's property made available for disposition as the result of the conversion program. That property of varying characteristics was the subject of more than one transaction and different parties participated therein, does not necessarily negate the

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parties to the scheme and responsible in law for the acts of their fellow confederates in furtherance of the scheme, if committed during the existence of the scheme. * * *

* * * * * * *

"In summary, therefore, as to the mail fraud and wire fraud counts, in order to find any one of these defendants guilty, you must find that there was an overall scheme initiated by one or more of these defendants to defraud the Transit Company of its assets, real or personal, which were abandoned or made available for sale by reason of the conversion from streetcar transportation to bus transportation. If there has not been established such an overall scheme to defraud beyond a reasonable doubt, then no defendant can be found guilty of any of these counts.

* * * * * * *

"A conspiracy, members of the jury, is an agreement of two or more persons by concerted action to perform an unlawful act. One person alone cannot conspire. Two or more persons are indispensable. The essence of a conspiracy is a common design which actuates the parties. * * *

"The question you should ask yourselves, in light of the evidence is: Was there an agreement or understanding to loot or plunder the Transit Company, either express or implied, between two or more of the defendants named and embraced in that overall scheme that they would commit one or more of the unlawful acts charged in the conspiracy count of the indictment?"

existence of one common and broad objective, or conclusively establish that each transaction was the product of an independent agreement or scheme to defraud.

The scheme made its appearance in the methods adopted and pursued in the handling and disposition of the first item of surplus property—overhead scrap and rails. From this beginning in 1951 fraudulent conduct dominated the disposition of scrap until the last lot was disposed of in late 1955. The fraud intensified as scrap disposition progressed until, as aptly stated by the trial court: "* * * Ossanna and Larrick having laid the ground work so as to allocate to themselves complete control of the disposition of the underground cable, boldly permitted American, through Harry and Fred Isaacs, to write its own ticket, figuratively and literally, as to the price American was to pay for this scrap, with the resulting substantial monetary loss to the Transit Company." In the interim, the fraud made its appearance in other transactions to which we have alluded. Thus through the combined efforts of appellants, the Company was mulcted out of property of staggering proportions.[32]

The jury was entitled to consider the relationship of appellants to each other and to co-conspirators not named as defendants as an additional factor bearing heavily on the hypothesis of one scheme and conspiracy. The evidence indicated that Ossanna was the dominating character. He apparently masterminded the scheme and its fruition and played the leading role. Closely allied to Ossanna and col-

32 Loss from underground cable $815,000, Mexican notes $238,439, Hopkins Right-of-Way $75,000 (this is based on appraised value of property—Carlson and the Ossannas actually netted over $90,000 from the transaction), Jeffords' commissions $107,500, Towey Lots $5,000. Additionally, there was the loss from overhead scrap and rails, the amount of which does not appear with certainty. We have seen, however, that the Company was required to pay to the City of Minneapolis approximately $1,200,000. There was evidence from which the jury could find that a large portion of this expense should have been borne by American.

laborating with him in the machinations were appellant Larrick and defendant Towey. While their activities were not as prominent, it is apparent that without their assistance it would have been difficult to perpetrate and effectuate the fraudulent scheme. Appellant Harry Isaacs was not a direct actor in all the various transactions but he too performed an important role in the overall scheme. If not an originator of the scheme, he soon became a party thereto. His part in the fraud is made manifest from the scrap disposition (the scheme had its genesis in the handling of the scrap and it had its demise in the scrap). Harry Isaacs was the recipient of other Company property. In December, 1953, the Mid-Continent Development and Construction Company (a partnership consisting of Harry Isaacs, owner of 47½%, Robert Levitt, Isadore Blumenfield and four other business associates) purchased seven parcels of real estate from the Company and various items of scrap for $300,000. The partnership sold the property in 1954 and 1955 for a sum in excess of $465,000. The sale to Mid-Continent was consummated after Ossanna had received other offers and had executed option contracts on certain of the parcels. The court ruled that the amount paid by the partnership for the property ($300,000) was not so grossly inadequate as to furnish evidence of fraud, and dismissed these counts of the indictment. However, the court instructed the jury it could consider the evidence relating to this transaction to show relationship of the parties.[33]

There was other evidence showing the close relationship between Harry Isaacs and Larrick, two of the principal actors in the scrap transaction. In 1955 and near the

33 The court instructed the jury that there was no evidence that Ossanna or Isaacs knew of the Blumenfield group's interest in Mid-Continent.

termination of the scheme, Larrick loaned Isaacs $10,000. The trial court viewed this transaction with some suspicion, stating in his after-trial memorandum: "Many inferences may be suggested from that episode. In any event, it is significant that Larrick, an officer of the Transit Company, loaned a substantial sum of money to one who at the time was looting his employer of thousands of dollars."

The role of appellants Fred Isaacs and Jeffords, charged with and convicted of participation in the overall scheme, under the conspiracy count, while less prominent, was nevertheless important and essential in carrying out the scheme. Fred Isaacs was secretary of American Iron and as such was a party to the original scrap removal. He was active in the whole scrap program. The fraud he practiced was of the rankest kind, as manifested in the changing of weight tickets to the benefit of American Iron and to the loss of the Company. The fraudulent disposition of the scrap became and was one of the major objectives of the scheme, it was part and parcel thereof, and being so, sound authority and common logic dictate that Fred Isaacs became a knowing participant in the scheme and aided in its perpetration.

Jeffords was a close associate of Ossanna and manifested more than a passing interest in the affairs of the Company. As a shareholder he became a member of Ossanna's stockholders' committee, which was successful in its endeavor to place Ossanna in control. As we have noted, he profited to the extent of $14,000 in the transactions involving the Hopkins Right-of-Way. His manipulations assisted in effecting the overall scheme whereby the Company paid to him a large sum of money without any consideration or benefit inuring to it.

The maze of circumstances furnishes adequate factual support for a finding that a common broad scheme and plan was conceived at or about the time the conversion program was initiated. As the scheme took form through concrete action, others joined as their efforts were required, so that a closely knit and relatively small group of men was drawn together, their efforts were united, and by devious, ingenious and unlawful means the common objective—looting the Company of substantial property—was effectuated. There were "insiders," Ossanna, Larrick and Towey; there were "outsiders" among them, Harry Isaacs, Fred Isaacs and Jeffords. From the ultimate result it becomes apparent that each fitted "so naturally into position in the fagot as to convince that [he was] a part of it." *Phelps* v. *United States*, supra, 160 F. 2d at p. 867.

Our holding does not run counter to the cases relied upon by appellants. They have been considered and in our view are distinguishable on the facts. No useful purpose will be served by an extended discussion of the factual elements present in the cases relied upon which required reversals of the judgments of conviction. We limit our examination to two opinions by the Supreme Court of the United States because of the urgent claim that they control.

In *Ingram* v. *United States*, 360 U.S. 672, the four petitioners and six others were convicted of a conspiracy to evade and defeat payment of federal taxes imposed on lottery operations. The Court held that the evidence was insufficient to support a finding that two employees of Ingram and Jenkins knew that the latter had not paid the taxes. In the course of the opinion the Court stated, at pp. 677-678:

> "It is fundamental that a conviction for conspiracy under 18 U.S.C. § 371 cannot be sustained unless

there is 'proof of an agreement to commit an offense against the United States.' *Pereira* v. *United States*, 347 U.S. 1, 12. There need not, of course, be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of the proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason of the gambling operation. 'Without the knowledge, the intent cannot exist.' *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711.

" '[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself.' The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of federal taxes, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge of willfulness. *Spies* v. *United States*, *supra*. Cf. *United States* v. *Falcone*, 311 U.S. 205."

From the foregoing, the appellants have erroneously concluded that the accused must possess full knowledge of every detail of an unlawful scheme before he may be properly held to be a part of it. We do not regard the case as so holding. As pointed out in *Blumenthal* v. *United States*, 332 U.S. 539, at p. 557, conspirators may be found guilty "without requiring evidence of knowledge of all * * * details [of the conspiracy] or of the participation of others."

In *Kotteakos* v. *United States*, 328 U.S. 750, the only question was whether petitioners had suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government conceded and the court of appeals had found (*United States* v. *Lekacos*, 2 Cir., 151 F.2d 170) proved not one conspiracy but eight or more different ones of the same sort executed through

a common key figure. The Supreme Court, in distinguishing *Berger* v. *United States*, 295 U.S. 78, held that a defendant has "the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others * * *." Having demonstrated the existence of substantial evidence to support the finding of a single overall scheme to defraud, the teachings of *Kotteakos* are clearly inapplicable. It is, of course, well settled that all parties joining a conspiracy, whether at the time it is formed or later, and who cooperate in the common effort to obtain unlawful results, assume responsibility for all that is done before or after becoming a party thereto. *Marbs* v. *United States*, supra, 250 F.2d 514, 522, cert. den. sub nom. *Sarkis* v. *United States*, 356 U.S. 919; *United States* v. *Compagna*, 2 Cir., 146 F.2d 524, 530, cert. den. 324 U.S. 867; *Lefco* v. *United States*, 3 Cir., 74 F.2d 66, 68.

We now direct our attention to the contention that in any event appellants are entitled to another trial. The claim is made that their rights were substantially prejudiced by the court's action in giving and refusing certain instructions, by its rulings on evidentiary matters and by the rebuttal argument of Government counsel.

Both indictments alleged that as a part of the scheme to defraud, Harry Isaacs and American Iron, having become obligated to the Company to fulfill substantial portions of its obligations to the City of Minneapolis, would be relieved of that obligation without consideration and at the expense of the Company. This portion of the indictments as well as considerable evidence bearing on the scrap transactions brought into focus the conversion ordinance adopted by the city in October, 1953, and to which prior reference has been made. More precisely, it became an is-

sue as to whether the ordinance was in fact a device or instrument to further the scheme and plan to defraud the Company. On this issue the defendants requested the court to give the following instruction:

> "There is no evidence that the passage of the Minneapolis Conversion Ordinance in October, 1953 was procured with the design of relieving American of its obligations to repave any of the streets in Minneapolis, or as a part of any scheme to defraud the Transit Company."

The court refused to give the requested instruction and proper exceptions were taken to such refusal, so that the court's action in that regard is preserved. The issue was submitted to the jury by the following portion of the court's charge:

> "It is the Government's contention that, to all intent and purposes, the contract of February 11, 1952, and the addenda thereto, were abandoned, and in pursuance of the scheme to defraud, American was relieved of its obligation to do any paving by the arrangement allegedly made by the defendant Ossanna in fostering the City Ordinance of October 30, 1953, which, according to the Government, in effect relieved American of its obligation to remove the tracks and to repave where necessary; that in order to be relieved of the obligations of rail removal and repaving which American had assumed under the February 11, 1952, contract and its addenda, together with being relieved of snow removal and sanding of streets, and so forth, and other provisions of the franchise, the ordinance provided that Transit was required to pay to the City of Minneapolis some $900,000, * * *.
>
> * * * * * * *
>
> "What about the ordinance passed by the City of Minneapolis to relieve the streetcar company of its

duty to remove tracks and repave and the other obligations which the streetcar company had under its franchise? Was that a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract, * * *? * * * (I)f you find that the agreement in that regard between the Transit Company and Minneapolis City Council was negotiated and made without fraud and not as a part of an alleged overall scheme to defraud, and if American Iron was in good faith ready, willing and able to perform the obligations expressed in its contract of February 11, 1952, and the two addenda, then the fact that, after that contract and addenda were executed, the conversion ordinance was enacted, the Transit Company was not discharged of its obligation to American under the contract of February 11, 1952, and the addenda, nor was American deprived of any of its rights under the contract and the addenda."

Although none of the defendants objected to the instruction, as required by Rule 30, Federal Rules of Criminal Procedure, four of the appellants, Ossanna, Larrick and the Isaacses, now assert error in the foregoing submission. While technically we would be justified in refusing to review the correctness of the given instruction, we have decided against that course. By offering the instruction and taking exception to its refusal, timely and specifically, the position of appellants was made known to the court. See and compare *United States v. General Motors Corp.*, 3 Cir., 226 F.2d 745, 750; *Hasselbrink* v. *Speelman*, 6 Cir., 246 F.2d 34, 39; Moore, Federal Practice, Vol. 5, § 51.04, p. 250. Moreover, consideration and determination of the question properly preserved (refusal of instruction) will entail exploration of whether the issue should have been submitted, and the correctness of the submission.

Specifically, the complaining appellants now contend that there was no evidence of fraud in the procurement of the conversion ordinance; that all negotiations and bargaining between the city officials on the one hand and the Company representatives on the other which were consummated in the adoption of the ordinance were at arm's length and in good faith; that there was evidence from which the jury could find that the contract of February 11, 1952, and the addenda thereto was a valid and binding agreement and that the terms thereof were being performed and complied with in every respect. Upon this factual premise appellants invoke the rule that where erroneous instructions are given on a basic issue, a conviction cannot be sustained on some other theory, even though "the appellate court is left without doubt" that the defendant is "guilty." *Bollenbach* v. *United States*, 326 U.S. 607, 614, 615; *Weiler* v. *United States*, 323 U.S. 606, 611; *Yates* v. *United States*, 354 U.S. 298.[36]

The instructions under consideration must be viewed in light of the evidence that was before the jury and the trial theory of the respective parties.

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36 *Bollenbach* presented an unusual situation. The Government conceded that the instruction under attack was an improper declaration of the law but argued that "the sting of error is extracted because there was proof, other than the erroneous 'presumption,' on the issue of Bollenbach's participation in the wrongdoing before the transportation of the stolen securities had ended. This is to disregard the vital fact that for seven hours the jury was unable to find guilt in the light of the main charge, but reached a verdict of guilty under the conspiracy count five minutes after their inquiry was answered by an untenable legal proposition. It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide." 326 U. S. at p. 614.

Yates is also clearly distinguishable in that the erroneous instruction went to the controlling law of the case.

In *Weiler* the court held it was prejudicial error on the facts of this case to refuse an instruction as to the quantum of proof required in a perjury case and thus is clearly distinguishable from the question under consideration. The court recognized that even as to such a basic proposition, it is not always prejudicial to refuse such an instruction, citing *Goins* v. *United States*, 4 Cir., 99 F.2d 147; *Goins* v. *United States*, 306 U.S. 622, 323 U.S. at p. 611.

At the outset, it may be said unequivocally that there was no evidence of fraudulent conduct on the part of the city officials or representatives of the Company with respect to the adoption of the conversion ordinance and when so viewed it is crystal clear that there was no fraud in the procurement of the conversion ordinance. A mere reading of the proceedings of the meetings antedating the conversion ordinance convinces that the involved parties were negotiating and bargaining in good faith and at arm's length. But fraud in the actual procurement or adoption of the ordinance was never an issue—no one contended that it was—and indeed the Government expressly disavowed any fraudulent conduct between the Company and the city. The Government's theory was, and this became a major issue, that Ossanna entered into an arrangement with the Isaacses whereby they would ostensibly discharge the obligations of the Company to the city under the franchise agreement then in effect, well knowing such arrangement would never be carried out; that Isaacs' company, American Iron, would never be called upon or required to discharge its obligations under the contract, and that the Company would later of necessity be forced to further obligate itself to the city to secure removal of its property from the streets, to repave and otherwise improve the streets formerly occupied by Company property in order that the conversion program could actually be put into operation. It was in this factual setting that the Government contended that the adoption of the conversion ordinance was in fact a part of the scheme and device to defraud.

In summary, the jury was entitled to give consideration to the question of whether the conversion ordinance was another facet of the scheme to defraud. The refused instruction would have completely removed this issue and

any consideration thereof from the jury, hence the court's action in refusing to give it was not error.

We recognize that the language used in the given instruction could have been more explicit, and that standing alone and without regard to the evidence and the theory adopted by the parties, it might be susceptible to the interpretation which appellants now place thereon. However, when considered in light of the issue that was litigated and what actually transpired, we are satisfied that it did not serve to misdirect the jury or submit an issue that was not supported by evidence.

Even assuming arguendo that the instruction did permit the jury to find that the conversion ordinance was procured by fraud, we are not convinced that such error was prejudicial. The appellants theorize that, absent this instruction, the jury could have found the contract between the Company and agreement for removal of the scrap was a bona fide agreement and that the parties were in good faith recognizing and complying therewith and that the finding of fraud with respect to the scrap may have been predicated upon fraudulent procurement of the conversion ordinance for which there is no evidentiary support. Thus, in effect, appellants would have us assume that the jury found no fraud in the scrap transactions even though the evidence of fraud, quite apart from the ordinance, was substantial, and that it did find fraud in the procurement of the conversion ordinance where there was absolutely no evidence of fraud. Although we cannot speculate on what may have been the basis for the jury's verdicts, we are not required to indulge in the assumption that a jury that deliberated for five full days and returned verdicts which demonstrated a clear and understanding grasp of the evi-

dence and the law, was a jury that lacked all common sense.

As we have seen, Ossanna, Larrick and Harry Isaacs were convicted of the substantive offenses of interstate shipments of property fraudulently obtained and they with Fred Isaacs and Jeffords were convicted of the conspiracy to commit the substantive offenses. The contention is now made by Ossanna, Larrick and the Isaacses that their rights were substantially prejudiced by the manner in which the interstate shipment counts were submitted to the jury. Specifically, it is asserted and argued that these alleged offenses should have been submitted as a part of the overall scheme and artifice to defraud the Company.[37] Additionally, these appellants also contend that the evidence was insufficient to justify a finding that the property transported was obtained by fraud, i. e., that the proper foundation was not laid in that respect. Ossanna and Larrick also argue that there was no evidence that they participated either directly or by concert in obtaining the property by fraudulent means or that they participated in the shipment thereof or derived any benefits therefrom.

In our view, it is unnecessary to consider or dispose of these claims of error. Firmly embedded in federal jurisprudence is the principle that a general sentence on several counts of an indictment will be sustained on appeal if

37 Counts XIV, XV and XVI covered the interstate shipments of property fraudulently obtained but did not charge that these offenses were a part and parcel of the overall scheme to defraud. However, the Government in response to motions for bill of particulars did claim that the fraud in connection with the property that was the subject of these counts was committed in fulfillment of the scheme and artifice which was alleged in the first count. During the trial the Government asserted that it was not necessary that a conviction under Counts XIV, XV and XVI be predicated on a finding that the offenses there charged were a result of the overall scheme. The trial court agreed and refused to submit the counts on that theory.

the defendant was properly convicted under any count which is good and which is sufficient in itself to support the judgment and sentence. *Barenblatt* v. *United States*, 360 U.S. 109, 115; *Lawn* v. *United States*, 355 U.S. 339, 359; *Bunn* v. *United States*, 8 Cir., 260 F.2d 313, 316; *Guon* v. *United States*, 8 Cir., 285 F.2d 140, 142.

The court imposed a general sentence on Ossanna, Larrick and Harry Isaacs on their convictions of Counts XIV, XV and XVI (interstate shipments) and XVII (conspiracy). The sentences thus imposed (four years imprisonment and $10,000 fine on Ossanna and Harry Isaacs, two years' imprisonment and $2,000 fine on Larrick) are within the limit of punishment authorized for conviction of conspiracy. Title 18 U.S.C.A. § 371.

We have demonstrated and held in our disposition of the main issue that there was substantial evidence to support the finding of an overall scheme and conspiracy, and the convictions of conspiracy. In this situation the complaining appellants were not prejudiced by the claimed erroneous submission of the interstate shipment counts.

Appellant Fred Isaacs contends that the trial court committed reversible error in refusing to strike certain testimony elicited from a Government witness.

Special Agent of the Internal Revenue Service, Judson H. Peterson, testified that on September 11, 1959, he and another special agent called on Fred Isaacs, primarily for the purpose of obtaining a specimen of his handwriting. Apparently the agents were making an investigation with respect to income tax returns filed by Harry and Fred Isaacs. During the conversation Harry Isaacs, who was also present, refused to give a sample of his handwriting and stated that his attorney had instructed him to furnish

records but to do no more than that. Then Fred Isaacs said something "about wondering why the Internal Revenue agents or Internal Revenue Service was investigating this case, and he mentioned something about newspaper publicity, * * *. Then Fred went on to say, he said, 'Answer one question,' and he brought up, as he called it, a problematical case, 'Of a *company like ours that stole from the Transit Company a lot* but reported the profits, why is the Internal Revenue in on it?' He said, 'it's something for the stockholders.' * * * Then Harry Isaacs stated, 'We are not the only ones that got something from this company. How about that guy in St. Paul? How about Northern States Power?' Then he went on to say, 'Is it because it came out this fellow Blumenfield is in Mid-Continent?' " (Emphasis supplied) Following this testimony the court recessed for a brief period, and upon proceedings being resumed, counsel for Harry Isaacs moved the court to strike Peterson's testimony to the effect that Harry Isaacs had refused to talk, but no motion was made to strike Peterson's testimony relating to Fred Isaacs nor was any objection registered with respect to the alleged statement by Fred Isaacs. To the contrary, counsel for the latter cross-examined Peterson at some length in regard to the statement and attempted to establish that the statement was hypothetical in character and further that Fred Isaacs was very cooperative during the interview. On re-direct examination the statement was again explored by Government counsel, at which time counsel for Harry and Fred Isaacs made this objection: "Objected to as not proper re-direct examination, Your Honor; repetition." Peterson's testimony completed the proceedings for the day, and the next morning, for the first time, counsel for Fred Isaacs moved the court to strike the italicized portion of Peterson's testimony on

the ground that the statement attributed to Fred was hypothetical in nature and could not under any circumstances be regarded as an admission against interest. The motion was denied and error is now assigned because of the court's action in that respect.

The state of the record brings into question the reviewability of the assignment now urged upon us. The rule is firmly settled that objections to evidence should be made as soon as it is apparent that the evidence is for any reason objectionable. This rule, of course, has a very salutary purpose. It affords the trial court an opportunity to act promptly in an effort to remove from the jury's consideration evidence which for any reason has no place in the lawsuit. We were confronted with a similar situation in *Marx* v. *United States*, 86 F.2d 245, and there laid down the rule in this language (86 F.2d at p. 251):

> "Again, it is noted that the testimony at which the motions are directed was for the most part admitted without objection, and the grounds for objection thereto were as apparent when the evidence was offered as at the close of the testimony. Counsel could not be permitted to sit idly by and permit the witnesses to testify, possibly hoping that his client might benefit thereby, and then, finding that the testimony was not beneficial, move to strike it out. Such a practice cannot be tolerated. It is only when evidence apparently admissible when offered is shown by subsequent developments to be inadmissible that the objection may be made in the form of a motion to strike out or by a request for an instruction that its effect be limited or that it be withdrawn from the consideration of the jury. *St. Louis & S. F. R. Co.* v. *Duke* (C.C.A. 8) 192 F. 306. Ordinarily, an objection to the introduction of testimony must be made at the earliest possible opportunity after the ground of objection be-

> comes apparent, or it will be held to have been waived, and a motion to strike out objectionable testimony must be made at the time the testimony is given if the ground of objection to it is then apparent."

The *Marx* case was cited with approval and followed by the Sixth Circuit in *Metcalf* v. *United States*, 195 F.2d 213, 216, where it is stated:

> "It is the well settled rule that objections to evidence should be timely made when the evidence is offered, and that it is within the discretion of the trial judge to sustain or overrule a motion, delayed until the close of the Government's case, to strike from the consideration of the jury evidence previously received without objection."

and by the Second Circuit in *United States* v. *Parnes*, 210 F.2d 141, 143. Thus the question to be resolved is whether under the circumstances of the situation we may now properly say the trial court abused its discretion in denying the motion to strike. It can hardly be gainsaid that if the statement of Fred Isaacs was an admission against interest, which is the position of the Government, then by all rules of evidence it was clearly admissible. See *Opper* v. *United States*, 348 U.S. 84; *On Lee* v. *United States*, 343 U.S. 747, 756; *Segel* v. *United States*, 8 Cir., 246 F.2d 814, 818, cert. den. 355 U.S. 894; *Hill* v. *United States*, 9 Cir., 261 F.2d 483, 489; *Moreland* v. *United States*, 10 Cir., 270 F.2d 887, 890; 22A C.J.S. Criminal Law, § 730; Wigmore on Evidence, 3 Ed. Vol. 4, § 1050.

Considering the circumstances under which the statement was made—the fact that Fred Isaacs knew that he was a suspect and that income tax returns with which he was connected were being investigated; that he was told

by the special agents that they took cognizance of other federal offenses, we are inclined to view the statement under question as an admission against interest and properly admissible. In any event, having in mind that the evidence of fraudulent conduct on the part of Fred Isaacs with respect to the scrap transactions was substantial, if not overwhelming, we are unable to perceive of any prejudice flowing from the court's refusal to strike the testimony.

The final assignment of error common to all appellants is that the Assistant United States Attorney in closing or rebuttal argument was guilty of such deliberate, repeated and flagrant misconduct as to seriously prejudice their right to a fair trial. We shall review the circumstances pertinent to this contention.

The arguments of counsel consumed a total of five days. All of July 25, 1960 and a portion of July 26 was required by Mr. Clifford Janes, Assistant United States Attorney, in presenting the opening argument for the Government. Counsel for defendants (five in number) presented their arguments on July 26 through July 28. Mr. Hyam Segell, Assistant United States Attorney, made the rebuttal argument which is the subject of attack and consumed all of July 29 in doing so. Not a single objection was made or voiced by any of the attorneys during the course of Mr. Segell's argument. However, after the conclusion thereof approximately sixty exceptions were taken by appellants' counsel. Judge Nordbye duly considered the exceptions and in his charge specifically instructed the jury to disregard certain portions of Mr. Segell's argument.

During oral argument, we were told that in failing to make any objection during the course of the claimed prejudicial remarks counsel for appellants followed the custom

or practice which has prevailed in the United States District Court for the District of Minnesota apparently since our opinion in *London Guarantee & Accident Co.* v. *Woelfle*, 8 Cir., 83 F.2d 325, 338-344.[38] That case was decided in 1936 and prior to the effective date of the Federal Rules of Civil Procedure in 1938, and the Federal Rules of Criminal Procedure in 1945. However, subsequent to the adoption of the rules we stated in another civil case, *Chicago & N. W. Ry. Co.* v. *Green*, 8 Cir., opinion filed October 27, 1947, 164 F.2d 55, at p. 64:

> "A party is not entitled as a matter of right to seek a reversal for improper argument to the jury, where he fails to make objections during its course, *or to take exceptions promptly at its close.*" (Emphasis supplied).

Our attention has not been directed to a criminal case where we had occasion to deal with the question and independent research fails to disclose that we have considered the matter. Other circuits have spoken on the subject. The Second Circuit held by implication, if not directly, that Rule 51, Federal Rules of Criminal Procedure (same as Rule 46, Federal Rules of Civil Procedure) contemplates that the objection should be made at the time of the improper argument. In *United States* v. *Kyle*, 257 F.2d 559, cert. den. 358 U.S. 937, at p. 564, that Court stated:

> "What defendants now characterize as 'inflammatory and personal vituperation' and a 'heated appeal

38 We note, however, in Fred Isaacs' brief, this statement appears: "At the outset, the prosecutor carefully forestalled any challenge by defense counsel or possible rebuke by the trial court during the course of his argument, by blandly assuring the jury that 'it is a courtesy among lawyers not to interrupt each other in final argument.' *The supposed custom is not evidenced by the record (and was, indeed, unknown to other counsel)*, but defense counsel could not thereafter object to any misstatement during the course of the argument without incurring the risk of offending the jury." (Emphasis supplied).

> to passion' by the prosecutor on summation apparently failed to stir either of them or their counsel *at the time* of the utterances into voicing an objection or a request for a direction from the court. Rule 51, Fed.R.Cr.P., 18 U.S.C.A." (Emphasis supplied).

Even before the rules were adopted, the Seventh Circuit, in *Paschen* v. *United States*, opinion filed April 12, 1934, 70 F.2d 491, at p. 502, made this observation:

> "* * * the ordinary method for undertaking to keep overenthusiastic counsel within fairly reasonable bounds is to call the court's attention from time to time to alleged departures, and to procure from the court a ruling and direction with reference thereto. It does not appear that *at any time during* the argument objection was made to the things now urged as error, and we do not find these so palpably improper as would justify us in taking notice of them without timely objection, and thus to give opportunity for correction, if correction is necessary." (Emphasis supplied).

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, opinion filed May 6, 1940, the question was not an issue, but we note that the Court did state at p. 240:

> "Under the second of these objections, respondents complain of the plea to the jury not to 'let your Government and the United States and its citizens and society down,' and that government counsel 'believe to the bottom of their hearts in the justice of the cause that they espouse here.' No objection *at that time* was made by defense counsel." (Emphasis supplied).

In a situation where, as here, the claim is made that the prosecutor engaged in making repeated prejudicial statements to the jury throughout his argument and from the

inception thereof, we believe the better practice is to make objection at the time of the asserted prejudicial utterances. This will afford the court an opportunity to properly warn the prosecutor that improper argument will not be tolerated, and to promptly take action designed to more effectively remove from the minds of the jury the sting or poison of the prejudicial statement. This is the practice that has been adhered to in a number of criminal cases. See and compare *Mellor* v. *United States*, 8 Cir., 160 F.2d 757, 765, cert. den. 331 U.S. 848; *Myres* v. *United States*, 8 Cir., 174 F.2d 329, 338, cert. den. 338 U.S. 849; *Greenberg* v. *United States*, 1 Cir., 280 F.2d 472, 474; *United States* v. *Spangelet*, 2 Cir., 258 F.2d 338, 342; *Weathers* v. *United States*, 5 Cir., 117 F.2d 585, 596, cert. den. 316 U.S. 681; *Henderson* v. *United States*, 6 Cir., 218 F.2d 14, 21, cert. den. 349 U.S. 920.

Since it is apparent that all of the parties and the court regarded what transpired as being sufficient to preserve the right of appellants to have the argument to which exceptions were taken reviewed on appeal; we have proceeded accordingly.

While the propriety of the argument of Government counsel in criminal prosecutions has been the subject of consideration in many cases, no exact or precise test or standard may be applied to all situations. The dominating question, always, is whether the argument complained of was so offensive as to deprive the defendant of a fair trial. It is not amiss for us to again point out that in a criminal case, the United States Attorney has imposed upon him a high and important responsibility. He should present the Government's case with vigor and earnestness, and use all legitimate means to bring about a just conviction, but, like-

wise, he must refrain from indulging in tactics or methods calculated to produce an unjust conviction. In *Berger* v. *United States*, 295 U.S. 78, heavily relied on by appellants, the Supreme Court gave this admonition, at p. 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

While the "improper methods" test is broad in its meaning, "* * * each case necessarily turns on its own facts." *United States* v. *Socony-Vacuum Oil Co.*, supra, 310 U.S. at p. 240. Thus, we are required to determine whether in light of all the facts and circumstances, with particular emphasis on all of the arguments, the utterances complained of so influenced the jury as to bring about an unjust conviction.

We deem it unnecessary to enumerate and discuss the numerous objections to Mr. Segell's argument. It is sufficient to say that the alleged prejudicial remarks may be characterized, generally, as being—one, outside the record and beyond the scope of the record; two, defamatory and derogatory of defendants and their counsel, and three, personal opinion and belief of guilt of the defendants. In

reaching our conclusions, it should be kept in mind that we are permitted to examine "only the cold print of the record, and therefore should weigh carefully the findings of the trial judge, who saw and heard the actual events, and found no prejudice. See *United States* v. *Holt*, 7 Cir., 1939, 108 F.2d 365 and *Tuckermann* v. *United States*, 6 Cir., 1923, 291 F. 958, 959." *Orebo* v. *United States*, 9 Cir., 293 F.2d 747, at p. 749. We have nonetheless meticulously examined and analyzed all arguments and have independently concluded that the utterances complained of, when viewed in context and in light of all circumstances, were not calculated and designed to produce an improper conviction and did not in fact have that effect. Judge Nordbye was of the opinion that Mr. Segell's argument in some respects went beyond the bounds of propriety, and specifically instructed the jury to disregard the improper statements.[39]

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39 In summary, the court instructed the jury that there was no evidence to support Mr. Segell's statement that the case was comparable to the fraud case of one Wilbur Foshay and the jury was instructed to disregard that statement; that there was no evidence to support Mr. Segell's statement that there was any money fraudulently passing back and forth between or among the defendants from the Jeffords commission transaction, or the Isaacs scrap transaction or the Francis commission payment; that any comment by Mr. Segell as to the position occupied by the defendants and their attorneys in the court room during the trial was without significance and any reference thereto was to be disregarded by the jury; that "(c)ounsel sometimes refer to their own personal opinions, or their own views or their own knowledge in their arguments. Well, unless such opinion or views or knowledge are based upon the evidence, they will, of course, be disregarded by you." The jury was instructed to disregard the statement by Mr. Segell to the effect that certain counsel for defendants during their arguments had "inspirational moments of truth." In this connection, the court stated to the jury: "I rather think Mr. Segell was indulging in some flights of oratory in using that expression, and he made use of it with reference to the arguments of Mr. Dienard and Mr. Smith. Well, in any event, such statements must not be taken by you as any reflection on the manner in which either of these counsel have conducted their defense, or as having any bearing upon the sincerity of the arguments which these lawyers have made in behalf of their clients." During his argument Mr. Segell referred to Mr. Jeffords as a "pathological liar." The court stated to the jury that "There is no evidence to sustain that statement, and that argument will be disregarded by you."

We cannot escape the conclusion that most of the objections to the argument resulted from hypercritical counsel who were, as aptly stated by Judge Nordbye, "overly sensitive" and who "with microscopic captiousness, find fault with the most innocuous statements of government counsel." We are mindful that prior to the commencement of arguments the trial of this case had consumed 63 working days. It was a bitterly fought contest with no quarter being asked and none being given by either side. "* * * (S)ome latitude must be given to lawyers' language in a hard fought case." *United States* v. *Kravitz*, 3 Cir., 281 F.2d 581, 586, cert. den. 364 U.S. 941. "In the heat of oral arguments and summations counsel sometimes use language they would not have used under less trying circumstances, and in order for such comment to constitute reversible error the language used must have been plainly unwarranted and clearly injurious. *La Feber* v. *United States*, 8 Cir., 59 F.2d 588." *Mellor* v. *United States*, 8 Cir., 160 F.2d 757, 765, cert. den. 331 U.S. 848. It is, of course, well settled that counsel for the Government is accorded the privilege of arguing to the jury all possible inferences which reasonably flow from the evidence. *Kempe* v. *United States*, 8 Cir., 160 F.2d 406, 411, cert. den. 331 U.S. 843; *Mellor* v. *United States*, supra, 160 F.2d at p. 765, cert. den. 331 U.S. 848; *Gray* v. *United States*, 8 Cir., 14 F.2d 366, 367.

It also appears that portions of the argument said to be prejudicial were motivated by statements made by defense lawyers in their arguments and consequently fall within the rule that prejudicial error does not result from improper remarks in closing arguments invited or provoked by opposing counsel. *Myres* v. *United States*, 8 Cir., 174 F.2d 329, 339, cert. den. 338 U.S. 849; *Brennan* v. *United*

States, 8 Cir., 240 F.2d 253, 263-264, cert. den. 353 U.S. 931.

In the final analysis the question before us is not whether Mr. Segell's argument was in certain respects beyond the bounds of propriety and improper, but whether it was prejudicial and prevented the jury from exercising freedom of judgment and thought in its deliberations. Of vital, if not decisive, importance is what transpired after the so-called prejudicial argument was delivered. The jury received the case at 5:30 p. m. on August 1, 1960, and deliberated until the morning of August 6 when the verdicts were returned. Defendant Blumenfield, who was the subject of some of the challenged argument, and whom the Government was manifestly interested in convicting, was acquitted by the jury.[40] Defendants Ossanna, Larrick and Isaacs were also acquitted of certain counts of the indictment. The sum total of the result demonstrates convincingly that the jury adhered to the court's admonition "to analyze and weigh all of the testimony you have heard so as to enable you to determine intelligently the factual issues which will be submitted to you. Then you are to apply the law which the Court gives to you to the facts as you may find them to be from the evidence so that justice may be done between the Government and these defendants." Certainly the time consumed in deliberating and the verdicts that were returned indicate unusual discernment on the part of the jury and should dispel any feeling that it was improperly influenced, prejudiced or misguided by anything that was said by Government counsel. The gross misconduct of the prosecutor in *Berger* v. *United States*, 295 U.S. 78, renders that case

40 Defendant Blumenfield was convicted of a Mann Act violation in the United States District Court for the District of Minnesota and his conviction was affirmed by this court. *Blumenfield* v. *United States*, 284 F.2d 46, cert. den. 365 U.S. 812.

inapposite. There, improper cross-examination was resorted to in that the prosecutor among other things assumed prejudicial facts not in evidence, bullied and argued with witnesses and in general conducted himself in a "thoroughly indecorous and improper manner." (p. 84) This infraction was compounded by an argument which the Supreme Court regarded as "pronounced and persistent." (p. 89) In reversing, the court looked beyond the improper conduct and concluded that "* * * [T]he case against Berger * * * may properly be characterized as weak—depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record." 295 U.S. 78, at p. 89. Significantly, the court also stated, at p. 89: "If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached." Here, there is no claim or suggestion that either of the Assistant United States Attorneys who prosecuted the case engaged in conduct during the trial which transgressed upon the rights of appellants and, unlike *Berger*, we cannot characterize this as a weak case. To the contrary, there was substantial and cogent proof pointing to the guilt of appellants.

The Supreme Court of the United States was again concerned with the argument of Government counsel in *United States* v. *Socony-Vacuum Oil Co.*, supra. As a reading of the opinion discloses, 310 U.S. pp. 238-243, counsel for the Government engaged in an argument which the Court regarded as "undignified and intemperate" and not comporting

> "with the standards of propriety to be expected of the prosecutor. But it is quite another thing to say that these statements constituted prejudicial error. In the first place, it is hard for us to imagine that the

> minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately. In the second place, this was not a weak case as was *Berger* v. *United States*, 295 U.S. 78, where this Court held that prejudice to the accused was so highly probable as a result of the prosecutor's improper conduct 'that we are not justified in assuming its non-existence.' " 310 U.S. at p. 239.

The Court's concluding remarks and observation on the subject of alleged improper argument are apropos here: " 'If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand.' " 310 U.S. at p. 243.

Anent the claim of procedural errors, the record attests to the patience and judicial poise maintained by the experienced and distinguished jurist who presided over the trial. His rulings demonstrate understanding, fairness, impartiality, and wisdom. Both the Government and the appellants were represented by able, experienced and vigorous trial lawyers. The record is replete with objections, motions, etc., and in every instance where necessary Judge Nordbye accorded all parties a full opportunity to be heard before ruling. While it is extremely difficult, if not impossible, for a trial of this nature to be conducted without error of some degree, we are convinced that none of the court's rulings was prejudicial, and that appellants were given a fair trial.

The judgments are

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX

District Court Opinion

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America,
Plaintiff,

vs.

Fred A. Ossanna,
James H. Towey,
Benson M. Larrick,
Isadore Blumenfeld,
also known as Kid Cann,
Harry H. Isaacs,
Earl A. Jeffords,
Defendants.

No. 4-59 Criminal 77

United States of America,
Plaintiff,

vs.

Fred Isaacs and Theodore Landy,
Defendants.

No. 4-60 Criminal 13

ORDER

This case is now before the Court on the several motions of the defendants Ossanna, Larrick, Harry Isaacs,

Jeffords, and Fred Isaacs for judgments of acquittal, or, in the alternative, for a new trial.

Mr. Ray G. Moonan, of Minneapolis, Minnesota, and Mr. Sidney P. Gislason, of New Ulm, Minnesota appeared in behalf of defendant Fred A. Ossanna;

Mr. Robert J. King, of Minneapolis, Minnesota, appeared in behalf of defendant Benson M. Larrick;

Mr. Donald K. Smith, of Minneapolis, Minnesota, appeared in behalf of defendant Earl A. Jeffords;

Mr. Benedict S. Deinard and Mr. Melvin H. Siegel, of Minneapolis, Minnesota, appeared in behalf of defendants Harry and Fred Isaacs;

and

Mr. Clifford Janes, Assistant United States Attorney, and Mr. Hyam Segell, Assistant United States Attorney, of St. Paul, Minnesota, appeared in behalf of the United States of America.

The defendant Ossanna was found guilty of the first, second, third, fifth, sixth, seventh, eighth and ninth counts; not guilty of the twelfth count; and guilty of the fourteenth, fifteenth, sixteenth and seventeenth counts of the indictment in Case No. 77.

The defendant Larrick was found guilty of the same counts and not guilty of the twelfth count of the indictment in Case No. 77.

The defendant Harry Isaacs was found guilty of the first, second, third, fifth and sixth counts; not guilty of the seventh, eighth, ninth and twelfth counts; and guilty of the fourteenth, fifteenth, sixteenth and seventeenth counts of the indictment in Case No. 77.

The defendant Jeffords was found guilty of the seventeenth count of the indictment in Case No. 77.

The defendant Fred Isaacs was found guilty of the conspiracy count of the indictment in Case No. 13.

Each of the moving defendants urges that the evidence will not sustain a finding of one single scheme to defraud under the mail or wire fraud statutes, or under the conspiracy statute. Rather, it is earnestly contended that the Government merely proved unrelated acts of these defendants or episodes which cannot be created into a structure of the overall scheme which the Government attempted to present. Hence, it is argued that the Government in effect required each of the defendants to defend as to certain unrelated acts of the others. Admittedly, if the defendants are correct, the hypothesis of one single scheme cannot stand and the motion for judgments of acquittal as to these counts should be granted. However, the difficulty under the evidence is not the hypothesis of one scheme or conspiracy, but rather who the knowing and intentional participants were in the overall plan, as alleged in these counts, to loot the Transit Company in the transition of that company from streetcar to bus transportation.

The Court fully recognizes that, in a long and protracted case such as this, there were times when the entire picture of the overall operations of the participants of the scheme charged did not stand out in bold relief, and to utilize a hacknayed illustration, it was not too simple to recognize the forest on account of the trees. But a fair and realisitic consideration of the entire record fully sustains the jury's finding as to the overall scheme and conspiracy to defraud as alleged in the indictment. The genesis of the overall scheme to defraud is to be found in the handling of Transit scrap by American Iron & Supply Company,

which was countenanced, approved, and knowingly aided by defendants Ossanna and Larrick. Thereafter, it was extended into what may seem at first blush to have been unrelated fraudulent activities, but all of the fraud which followed pertained to surplus property available for disposition by one or more of the defendants who were officers of the Transit Company.

It is the Court's view, therefore, that the jury was justified under the evidence in finding that there was such an overall scheme; that is, that the common purpose to defraud the Transit Company out of substantial sums of money was manifested by the handling of the Transit scrap, the Mexican notes, the Harriet lot transaction, the Hopkins right-of-way, the Jeffords real estate commissions, and the Villaume so-called commission kick-back. These were not mere isolated, unrelated schemes to defraud the Transit Company on the part of one or more of the defendants, as the defendants contend. They were part and parcel of a general purpose, a well-defined pattern to syphon off and divert moneys and property obtained from the surplus conversion properties over which one or more of the defendants had control. Moreover, the mere fact that the evidence did establish that one or more of these transactions may have been initiated in good faith and later became fraudulent does not negate the evidentiary value thereof in support of the overall scheme. The Midcontinent transaction, for instance, while not in and of itself fraudulent clearly throws light upon the close and intimate relationship between Ossanna, Larrick and Harry Isaacs, and the intent of the parties.

The very first contract for the purchase of scrap that Harry Isaacs had with the Transit Company in behalf of American Iron & Supply Company was fraudulent. He,

with the consent of Transit officials, became the highest bidder for Transit scrap by the manipulation of bids before the conversion program was under way. Then he was allotted the right to remove tracks and overhead wires at the inception of conversion without any formal contract. It was a mere letter arrangement accepted by Mr. Ossanna, and when Transit's public accountant protested the informality of this arrangement, which purported to cover the entire Minneapolis overhead wires and tracks, and after some six months of indifferent compliance by American, the formal contract, Government Exhibit BZ, was entered into. If there was any good faith effort on the part of American through Harry Isaacs to carry out either the letter or contract arrangement as to the removal of the tracks and overhead wires in Minneapolis, the evidence fully warrants the finding that Ossanna, Larrick and Harry Isaacs soon paid mere lip service to the original contract and the two addenda thereafter entered into. These contracts were the vehicles fraudulently utilized to enrich Harry Isaacs and his company with many hundreds of thousands of dollars wrongfully abstracted by underpayment to the Transit Company for underground cable and other scrap, and relieving American as a third-party beneficiary of its contract obligation relating to removal of tracks and the repaving of streets, the plan in that regard culminating in the passage of the City Ordinance which obligated the Transit Company to pay the City of Minneapolis some $900,000, plus special work not to exceed $300,000 in value to be performed by the Transit Company for the City in connection with the conversion.

The contention of defendant Harry Isaacs that American never purchased the underground cable from Transit, but that it was to have this cable for its labor and expense

in removing it is simply incredible in view of the conduct of the parties. While that assumption may have been a permissible construction of the contract, the parties never operated under such construction, and if they had, American would have been required to remove the tracks and do the necessary repaving of streets in Minneapolis, of which obligation it was relieved by the payment of some $900,000 by Transit to the City of Minneapolis. The undeniable fact is that defendants Ossanna and Larrick having laid the groundwork so as to allocate to themselves complete control of the disposition of the underground cable, boldly permitted American, through Harry and Fred Isaacs, to write its own ticket, figuratively and literally, as to the price American was to pay for this scrap, with the resulting substantial monetary loss to the Transit Company.

The question arises, however—are all of the incidents of alleged fraud relied upon by the Government in support of the overall scheme competent and relevant as to each of the named defendants? As to the defendant Ossanna, there can be no question as to the relevance and competency of the other so-called incidents in that he actively and knowingly participated in each of the other episodes relied upon by the Government except the Towey Harriet lot transaction. He was the dominant figure of the Transit Company in the scrap fraud, the Mexican notes transaction, the Jeffords commission, and the Hopkins right-of-way deal with Carlson. Although he was found not guilty of Count 12, the remaining Villaume count, the way that that commission deal was handled is illustrative of the manner in which benefits flowed to this defendant or his nominees from the disposition of the surplus Transit property made available on conversion.

Although one may conclude that defendant Larrick's

participation in the other incidents bearing upon the overall scheme to defraud was not as prominent or as inclusive as the defendant Ossanna's, nevertheless his activities in addition to the scrap fraud were numerous. It may be argued that his first dealings with the Mexican notes would indicate a bona fide attempt to dispose of them to the best advantage to the Transit Company, but his participation in the George Francis deal, the fantastic Jeffords commission payment, and the Hopkins right-of-way sale, fully justified the jury in making a finding that he had succumbed to the temptation to knowingly and intentionally participate with Ossanna and others in the plan and scheme to defraud the Transit Company out of substantial assets which would inure to that company during conversion. And as indicative of the close relationship between Larrick and Harry Isaacs during this period, it may be noted that the evidence disclosed that Larrick loaned Harry Isaacs $10,000 during the conversion program, which was allegedly repaid in a year's time. Many inferences may be suggested from that episode. In any event, it is significant that Larrick, an officer of the Transit Company, loaned a substantial sum of money to one who at the time was looting his employer of thousands of dollars.

Harry Isaacs was not an officer or director of the Transit Company, but his close relationship with the officers thereof, particularly Ossanna, is reflected in the scrap and Midcontinent transactions. Although he did not participate in the other real estate or the Mexican notes transactions, it seems inconceivable that the gigantic, long-continuing scrap fraud practiced in the name of American Iron could have been accomplished by that corporation without the knowing and intentional connivance of its chief officer.

director and stockholder. In view of the active participation of both Isaacs and Larrick in the general objects and purpose of the overall scheme, they cannot complain that, in the evidence offered to establish that scheme, one or more of their fellow schemers and conspirators garnered additional illgotten gains pursuant to the general plan that motivated each of these two defendants.

In arriving at this conclusion, the Court has given due consideration to Kotteakos v. United States, 1946, 328 U.S. 750, together with Schaffer v. United States, 362 U.S. 511, rehearing denied, 363 U.S. 859; Berger v. United States, 1935, 295 U.S. 78; and Canella v. United States, 1946, 157 F.2d 470. The common purpose which motivated these defendants through planned action in bilking the Transit Company out of property made available to it during conversion amply fulfills the requirements and teachings of the Kotteakos case.

The charges against the defendants Jeffords and Fred Isaacs are limited to the conspiracy count. Fred Isaacs was Secretary of the American Iron & Supply Company. In that capacity, he was a party to the original scrap removal contract and the two addenda. He was active in the entire scrap removal program, and personally changed many of the weight tickets so as to enable American to account for false weight on scrap purchased from Transit. The dominant fraud in the conspiracy count was the scrap fraud. The circumstances are sufficient to justify a finding of Fred Isaacs' knowing participation in this fraud with his father, Harry Isaacs. They were the chief executive officers of American. They controlled and directed the affairs of that company. All of the circumstances disclosed by the evidence amply establish that fact. The greater part of the trial was devoted to the scrap fraud. Being a party to the

dominant part of the overall conspiracy to defraud. Fred Isaacs cannot complain of prejudice by reason of the fact that evidence was introduced to show that his fellow conspirators launched into other fraudulent activities directed to the same general objectives, to wit, to defraud the Transit Company of real and personal property made available for disposition by reason of the conversion.

Perhaps a more difficult question arises with reference to the defendant Jeffords. That he was engaged in fraudulant real estate commission dealings with the defendants Ossanna and Larrick seems fully supported by the record. One could not fairly interpret the testimony otherwise. That these transactions were a part of the overall fraudulent scheme in which Ossanna and Larrick participated is likewise sustained by the evidence. But did Jeffords, according to the evidence, have knowledge of the objects and purposes of the conspiracy alleged, or did he merely participate in one phase of the scheme without knowledge of the objects and purposes of the overall plan and scheme set forth in the seventeenth count of the indictment? Jeffords did have an interest in the Hopkins right-of-way, which he disposed of to Carlson. When he received fraudulent real estate commissions on three distinct real estate transactions, it is clear that he was the prime mover in transactions of considerable magnitude which the jury must have found was part of the overall scheme to defraud and not an isolated fraudulent transaction. The Court charged the jury as to Jeffords in part as follows:

> "Coming now to the defendant Jeffords, you will understand that he, as well as the other defendants, cannot be found guilty of the conspiracy charge lodged against him and them unless he or they are, or were, a knowing and intentional party to the conspiracy count as alleged. That is true even though

there may have been something wrong or even fraudulent about the commission paid Jeffords, although I am not intimating one way or another as to the legitimacy of his commissions or payments. But I say, however you may find as to the commission or compensation paid him, you must find from all the evidence that, with knowledge of the conspiracy and its objectives and purposes, as set forth in th 17th count, he knowingly and intentionally became a party thereto.

"Well, consider the payments to Jeffords. Was there a bona fide, good faith basis for these payments? Or were they wrongful allowances of commission or payment to Jeffords in furtherance of an overall scheme to defraud the Transit Company? That question, members of the jury, will have to be determined by you in light of all the evidence. If the commissions or payments were in whole or in part wrongful and fraudulent, did he knowingly and intentionally enter into the conspiracy charged?"

Now, the jury necessarily answered that question in the affirmative, and construing the evidence in the most favorable light to the Government, the Court should not disturb that finding. Moreover, I am convinced that in making that finding Jeffords was not prejudiced by reason of the evidence as to other episodes of fraud which were part of the conspiracy and as to which Jeffords was not an active participant.

The defendants stress the fact that the timing of the various episodes upon which the Government relies to establish an overall scheme negates the Government's position in that regard. They seek to emphasize that the scrap deal had been substantially completed before the Mexican notes disposition, the Jeffords' commissions, and the Hopkins right-of-way deals came into fruition. But the disposi-

tion of the surplus property made available by conversion had not been completed, and the evidence is clearly subject to the interpretation that the plan contemplated that if and when circumstances would enable the schemers and conspirators to fraudulently divert conversion assets, such efforts would be, and were, made.

It is argued, for instance, that the officers of the Transit Company, including Ossanna, attempted to dispose of the Hopkins right-of-way in good faith and at the highest price that could be obtained, and it was only when such efforts bogged down that the property was sold for $10,000 to Carlson. Well, obviously, it is not necessary for the Government to establish the premise that each and every disposition of surplus conversion property was contaminated with fraud, or that in every instance fraud was the initial objective. Undoubtedly, there were occasions when circumstances suggested to the participants the inadvisability of any fraudulent conduct with reference to the disposition of surplus property. The record here does not disclose all the various deals which were made with reference to the disposition of the surplus conversion property. But it is fair to find from the record that, in the disposition of all the major properties, real and personal, which became available by reason of conversion, it was contemplated at some stage in the conversion program, if conditions were favorable and if opportunities were presented, that there would be either outright fraud practiced as against the Transit Company or special consideration given to one or more of the defendants.

The evidence as to the mailings is not in serious dispute, except that defendants urge that the evidence is not sufficient to establish the mailings alleged in the fifth and sixth counts. These counts pertain to mail matter from

Larrick to Harry Isaacs and from American to Transit in connection with Transit scrap. It is true that there was no direct testimony that on these letters were affixed United States postage stamps and that they were delivered by and through the United States mails. However, although the cases do require definite and convincing testimony as to the use of the United States mails in furtherance of a scheme to defraud, circumstantial evidence can establish the mailing beyond a reasonable doubt as well as direct evidence. Here, these two companies, American and Transit, were engaged in a long and continuing business transaction whereby American accounted for the weights of the scrap purchased, Transit invoiced American based on the weight information, and American accounted therefor to Transit by check. The usual and common practice of each company in carrying on business transactions in this manner was by United States mail. There was no evidence or even suggestion that the parties departed from this custom and practice in their protracted business dealings as above outlined.

The letters described in these two counts were conveyed from Transit to American and from American to Transit. There is no evidence that they were transported by carriers other than the United States mails, or that any practice other than by mail carriage had been followed by these two companies. Certainly, the only reasonable and convincing inference that can be drawn from the undisputed circumstantial evidence is that the United States mails were used, and if so, unquestionably for the purpose of executing the scheme to defraud.

Troublesome questions arise in determining whether the mailing of the annual reports in 1955, 1956 and 1957 as alleged in Counts 1, 2 and 3 come within the requirement

of the mailing under the terms of the mail fraud statute and as further limited by the recent case of Parr v. United States, 363 U.S. 370. The pertinency of these mailings is the omission of substantial accounts receivable owing to Transit by American Iron & Supply Company. A failure to disclose the shortages in moneys due Transit from American would enable the officers to prolong their activities by concealing from the stockholders the true situation. The question may not be entirely free from doubt, but I am persuaded that the finding of the jury that those mailings were made for the purposes of executing the overall scheme to defraud should not be disturbed.

Defendants Ossanna, Larrick and Harry Isaacs urge that the Court erred in separating out from the overall scheme to defraud Counts 14, 15 and 16, and hence these counts should not have been submitted to the jury on the question as to whether the cable scrap and/or feeder cable referred to in these counts were obtained by fraud, that is, the fraud which allegedly occurred when this material was sold by Transit to American. Although the response the Government made on October 16, 1959, to the defendants' demand for a bill of particulars as to these counts may have been somewhat ambiguous, there is no sound basis for defendants' contention that they were prejudiced by the Court's ruling as to these counts. There is an absence of any showing that these defendants would have cross-examined government witnesses any differently or presented their evidence in any other manner by reason of their contention that they understood that the fraud alleged in these counts was the overall scheme to defraud set forth in Count 1 rather than the particular fraud which pertained to the underground cable and overhead feeder cable. They were accorded a full opportunity to meet the Government's evidence as to these three counts. The evidence

satisfactorily and persuasively established that the underground cable and feeder cable referred to in these counts were shipped in interstate commerce; that the value of such shipments exceeded $5,000; and that the material in the shipments had been obtained by fraud. The jury was justified in finding that not only the underground cable but the feeder cable as well had been obtained by fraud.

That Harry Isaacs, who controlled and directed American, caused these shipments to be made in interstate commerce should be free from doubt. His activities as disclosed by the evidence in the scrap deals with Transit will permit no other conclusion. Undoubtedly, a more difficult question arises as to whether Ossanna and Larrick knowingly and intentionally aided and assisted Harry Isaacs in causing these shipments to be made. These two men, however, were active participants in the fraud. Therefore, we commence with the premise that both Ossanna and Larrick, by their conduct, enabled American to fraudulently obtain a large quantity of underground and feeder cable to dispose of in the usual and customary manner in which scrap dealers would handle such scrap, to wit, to be shipped in interstate commerce to the mills which would reclaim the lead and copper by processing such metals in furnaces adapted for that purpose. Larrick was a frequent visitor to the American scrap yard and was well acquainted with the facilities for loading scrap on to railroad cars for shipment. The knowledge that each of these defendants had of American's business operations would justify the jury in making a finding that their activities knowingly and intentionally aided and assisted Harry Isaacs in making these shipments in interstate commerce. But was it necessary for the Government to establish by direct evidence that when these two defendants participated in this fraud, they knew

that the scrap was to be shipped in interstate commerce? The three defendants, Harry Isaacs, Ossanna and Larrick, were knowingly involved in a scheme and plan to defraud whereby American, through Isaacs obtained underground cable and feeder cable. One of the confederates in the crime, Harry Isaacs, actively took charge of the merchandise thus obtained by shipping the same in interstate commerce as alleged in these counts. The offense thereby as to each of the defendants became complete under Section 2314, Title 18, United States Code. This view is supported in United States v. Tannuzzo, 2d Cir., 174 F.2d 177, 180, cert. den. 338 U.S. 815, rehearing denied, 338 U.S. 896, wherein the court stated,

> "But the evidence against Vespole was sufficient to convict him under the substantive indictment. The statute under which he was indicted and convicted of the substantive offense does not require proof of knowledge on his part that the stolen goods were to be transported in interstate commerce. It only requires that he knew that the goods had been stolen and that he caused them to be thus transported. If, as the evidence indicates, Vespole stole the furs and turned them over to Tannuzzo and Dellaratta to sell for joint account, without limitation as to where the sale was to be made, the jury might properly find that Vespole caused their transportation when one of his confederates arranged for a sale to Felstein pursuant to which they were taken across a state line. Conviction for the substantive offense would follow from our holding in United States v. Sherman, 2 Cir., 171 F. 2d 619, 623, 624, under a similar statute."

The several motions for judgments of acquittal filed by defendants Ossanna, Larrick, Harry Isaacs, Jeffords and

Fred Isaacs as to the count or counts set forth in their notices of motion are denied. It is so ordered.

Exceptions to these rulings as to each defendant are reserved.

The motions for new trial are predicated mainly upon the alleged misconduct of the Assistant United States Attorney, Hyam Segell, in his closing argument to the jury. Some of the objections would seem to emanate from supercritical and overly sensitive counsel who, with microscopic captiousness, find fault with the most innocuous statements of government counsel. Other objections have merit and the Court in his charge made specific references to them and instructed the jury to disregard government counsel's argument in the matters to which reference was made. It may be stated that the Court does not approve of the extent to which Mr. Segell assumed to draw certain conclusions and make certain assertions which the evidence did not justify, and his argument at times exceeded the standards of propriety that government counsel should observe. However, I am convinced that the portions of the argument objected to did not affect nor sway the jury to an unjust verdict.

Some comment may be made with reference to portions of Mr. Segell's argument and as to which objections were made. Mr. Segell stated to the jury:

> "Can you imagine my colleague, Clifford Janes, gentleman that he is, a man who will give up a point in a lawsuit rather than offend his fellow counsel, the gentleman that he is, can you imagine him sitting here—and he is in charge of this lawsuit—can your imagine him sitting here for 16 weeks believing that Earl Jeffords was innocent?"

Well, this statement was prompted by and in response to Mr. Smith's argument to the jury wherein he criticized government counsel because they did not afford his client, defendant Jeffords, a lie detector test, and intimated that the Government believed the testimony Jeffords gave before the Grand Jury or they would have given him a lie detector test. Certainly, in light of Mr. Smith's argument, this response was justified.

The Court in his charge instructed the jury in conformance with a request of the defendant Larrick that there was no evidence that Larrick had received any moneys or profits from any of the transactions which the Government contends were part of the scheme to defraud or conspiracy or that he received any property, money or thing of value in connection therewith. And then in light of the Segell argument to the jury wherein he assumed to argue that inferences could be drawn that out of the fraud these defendants received illgotten gains, the Court again stated to the jury that there was no evidence to support the statement of Mr. Segell that there was any money fraudulently passing back and forth between or among the defendants from the Jeffords commission transaction, or the Isaacs scrap transaction, or the Francis commission payments. Notwithstanding, the defendants contend that a new trial should be granted because Mr. Segell assumed to state to the jury that inferences could be drawn from the testimony that there were pay-offs or kick-backs to these defendants from the fraudulent transactions in which these defendants were engaged. But did the failure of the Government in every instance to trace the fraudulent diversion into the pockets of the conspirators negate the right to argue that there was a strong inference that, where there is fraud, illegal gains for someone is the inevitable, motivating purpose and result? Those who commit fraud do not

carry on such activities for altruistic purposes or objectives. Someone usually benefits from wilful fraud. Otherwise, there would be no purpose in indulging in such activities. Certainly, Harry and Fred Isaacs obtained fraudulent money by reason of their conduct, and Jeffords likewise. And Ossanna clearly received fraudulent benefits through the Hopkins right-of-way deal and Towey through the Harriet lot sale. The inference that someone profited in carrying out the activities which established the overall scheme to defraud was so pronounced that Jeffords' counsel, Donald Smith, in his closing argument, recognized that the manner in which Jeffords handled the commission moneys he received would strongly indicate that there was a pay-off to someone. But he presumed to argue that, in that Jeffords was a gambler and was in the habit of handling cash money in the manner which he did, no such inference, therefore, was justified. Is it conceivable that Jeffords received over $100,000 on phoney commission deals without someone participating in the spoils? Or can reasonable persons believe that the palms of someone were not greased when George Francis was paid $238,000 in commissions? Or that when the Isaacses, with the connivance of Ossanna and Larrick, were permitted to swindle the Transit Company out of thousands of dollars due it for scrap without those who fraudulently worked hand in hand with them being rewarded in some manner for their contribution to the illegal windfall? The jury could not be expected to deliberate on the facts of this case as if in a vacuum immunized from the facts of life.

The Court did state that there was no evidence of pay-offs and kick-backs as related above, and there was no direct evidence in that regard, but that did not mean necessarily that, if the jury found fraud, the jurors should

not use their common sense as rational human beings and draw such inferences as reasonable men would do under the circumstances. Moreover, this was not a close case where some unjustified remarks of the prosecutor may have brought about an unjust result. The fact that the defendant Blumenfeld was acquitted and that the defendants Ossanna, Larrick and Harry Isaacs were acquitted on certain counts would indicate that the attacked summation of the Assistant United States Attorney should not be the basis for a new trial.

The statement of the Court that this was not a close case does not mean that difficult and troublesome questions did not arise, or that the almost four months' trial was free from problems for the Court and the jury. However, that there was fraud in the scrap deals with American, that there was fraud in the payment of commissions to Jeffords, that there was fraud in the payment of the Francis commission, that there was fraud in the Harriet lot sale, and in the Hopkins right-of-way transaction with Carlson, was overwhelmingly clear. Defendants' counsel argue, however, that the very suggestion by the Assistant United States Attorney to the jury that money passed between these defendants as the result of the American scrap transactions and the Jeffords and Francis commission payments, would tend to unduly sway the jury so that they would be influenced to find fraud where no fraud existed. But that argument is not persuasive with reference to the Jeffords commission which was baldly fraudulent on its face, or as to the Francis commission where the notes in question were discounted at from five to eight per cent, together with a brokerage fee of $5,000 to certain New York attorneys, while George Francis received over $238,000 as commission. The Court is convinced that, in light of

the entire record and the Court's charge, government counsel's argument as to kick-backs and pay-offs did not sway the jury to an unjust verdict.

The Court has considered all of the various grounds asserted in support of the motions for judgments of acquittal or a new trial. Many of the matters were fully argued during the trial or at the conclusion of the Government's case, and at the close of all the testimony. Further detailed discussion on my part should not be necessary. In such a long and arduous trial, it would be unusual indeed if the Court did not commit some error. But the Court is convinced that any errors committed would not justify a new trial. The Court bent every effort to give these defendants a fair trial and they received an impartial trial. The entire proceedings were remarkably free from incidents that would tend to incite or prejudice the jury against the defendants.

After careful consideration, I am of the opinion that the showing here does not justify the granting of a new trial to any of the defendants and their respective motions in that regard will be, and are, denied. It is so ordered. Exceptions are reserved.

The moving defendants will appear before this Court on Tuesday, November 15, 1960, at 9:00 o'clock A.M., for sentence. Counsel are advised accordingly.

Dated this 5th day of November, 1960.

BY THE COURT:

GUNNAR H. NORDBYE,

United States District Judge

APPENDIX

Minneapolis Conversion Ordinance of October 30, 1953

OFFICIAL PUBLICATION
of ORDINANCES and RESOLUTION
passed by the City Council of the
City of Minneapolis, Minnesota, at an
Adjourned Session of the Regular Meeting
of October 30, 1953, held October 30, 1953.

(Published November 3, 1953, in Finance and Commerce)

AN ORDINANCE

To provide for the paving, surfacing and restoration of the City Streets on the Minneapolis Street Railway Company right-of-way by the City of Minneapolis and the Minneapolis Street Railway Company, and the payment by the Minneapolis Street Railway Company for said work as a condition to the discontinuance of streetcar service on lines in the City of Minneapolis.

Whereas the Minneapolis Street Railway Company, hereinafter referred to in this ordinance as the "Company", has a franchise with the City of Minneapolis, hereinafter referred to as the "City", for the operation of its street railway on the streets of the City of Minneapolis, consisting of an ordinance passed by the City Council on July 9, 1875, approved July 17, 1875, entitled "An ordinance authorizing and regulating street railways in the City of Minneapolis," (City Ordinances, Permanent Edition, 61:1), and an ordinance passed by the City Council on September 19, 1890, approved September 22, 1890, entitled "An Ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis, by elec-

tricity," (City Ordinances, Permanent Edition, 61:19), under the terms of which the Company has obligations to pave, maintain, repair and improve the space between the rails of its tracks in the City of Minneapolis; and

Whereas the portions of the streets between the Company's tracks are at the present time in need of substantial repairs and replacements to comply with the Company's obligation under the foregoing provisions of its franchise, and the Company has other obligations in respect to the City streets under the provisions of said franchise; and

Whereas the Company has applied to the City of Minneapolis for permission under its franchise to discontinue the operation of its streetcars on certain of its lines and tracks, and contemplates in the future applying for discontinuance of operation of its streetcars over its remaining lines and for the substitution of buses therefor over routes to be determined; and

Whereas upon the discontinuance of the operation of the Company's streetcars on the various routes it will be necessary on certain of the City streets to remove the tracks, switches, ties, paving and other equipment in the streets used in the operation of the Company's street railway system and to reconstruct and pave such portions of the street as may be necessary as the result of such removal, and, certain of the other streets, it will be necessary to prepare the surface of the streets by removal of mates, frogs, switches, cross frogs, turn-offs and other special work, and to remove or stabilize loose rails and paving blocks so that the City may surface those streets with paving on top of the rails and right-of-way of the Company; and

Whereas it has been determined that it is practicable for the City to perform a portion of this work, consisting of paving and repaving, where necessary, and surfacing the street over the rails and right-of-way, where repaving is not deemed necessary;

The City Council of the City of Minneapolis do ordain as follows:

Section 1. This ordinance is designed to prescribe the procedure to be followed by the Company as a condition to the discontinuance of the operation of its streetcars in the City of Minneapolis on any of its lines, pursuant to its duty under its franchise; and the consent of the Company and compliance with, the terms of this ordinance shall be made before the City Council shall relieve the Company of its obligations under its franchise and approve of discontinuance of the operation of streetcars on any of the Company's lines.

Section 2. For the work to be done by the City in paving and surfacing the portions of the streets now covered by the Company's tracks and right-of-way, the Company shall pay to the City the sum of Ten Thousand Dollars ($10,000.00) per street mile where there are tracks of the Company in the City streets, to be paid in the manner hereafter provided. The streets for which payment is to be made include all streets in the City of Minneapolis wherein street railway tracks are now located (with the exception of certain dirt streets, as hereinafter provided); including streets upon which streetcars are now being operated and streets upon which streetcar service has already been discontinued. The number of miles of streets for which payment is to be made has been calculated and ascertained by the Engineer for the Company, and it is hereby deter-

mined and agreed that the number of miles of streets requiring paving and resurfacing, and for which the Company shall make payment, as so determined by its Engineer, is 92.279 miles.

Section 3. In addition to the payment provided for in the preceding paragraph, the Company shall perform work and assume obligations as follows:

On the streets where it is determined by the City Engineer that the portion of the street occupied by the Company's right-of-way need not be repaved, the Company shall remove all mates, frogs, cross-frogs and switches, and shall remove such portions of branch-offs or turn-offs as shall be designated by the City Engineer; and, when directed by the City Engineer, the Company shall restore the street following the removal to a solid and secure condition within two inches of the track grade in preparation for paving surfacing by the City. When directed by the City Engineer, it will remove all loose paving blocks or paving materials on the Company's right-of-way, and when materials are removed, if directed by the City Engineer, the Company shall replace them by concrete or other materials to make the surface secure as a base for paving surfacing by the City. The rails and materials removed by the Company under the provisions of this paragraph shall become the property of the Company. The surface of the right-of-way and the rails shall be lowered or raised to within two inches of the grade of the adjoining rails. This includes the raising of low or depressed rail joints. This work shall be done as requested by the City Engineer and at the times and in the manner directed by and under the supervision of the City Engineer. The Company shall perform the work provided for in this paragraph only to the

extent of a cost to the Company of not to exceed $300,000. As the work progresses the Company shall furnish the City with monthly statements, on or before the 20th of each month, showing the amount of work provided for in this paragraph which has been performed during the preceding month. When the work performed by the Company approaches the $300,000. limitation, the Company shall give the City thirty days' notice before it discharges its crews and disposes of its equipment; and if the City so elects by promptly notifying the Company, the Company shall retain its crews and equipment for the continuation of any unfinished work provided for in this paragraph at the expense of the City, with the understanding that the City Engineer specify to the Company the additional work to be performed sufficiently in advance so that the crews retained by the Company shall be employed without interruption or layoff. Any amounts for which the City shall be obligated to the Company on account of this continuance of the work shall be applied against the payments due from the Company and accruing thereafter.

The Company shall remove trolley poles as requested by the City and backfill the holes. In instances where poles have to be cut off, such cutting shall be done below the surface of the ground or sidewalk. Where the poles are located in concrete surfacing, such as sidewalk, the surface where the poles have been removed shall be replaced with concrete. Where poles are removed in seeded or lawn areas, the holes shall be capped with a minimum of one foot of backfill of soil suitable for the growth of grass.

The Company shall start on this work as directed by the City Engineer and shall complete the work by December 31, 1955; provided, however, that in the case of delay

caused by strikes or national shortages of materials, the time for completion shall be extended to the extent of the delay created thereby.

Upon request by the Company, the City, through its City Engineer, shall furnish to the Company information and instructions in respect to the work to be performed by the Company so that there will be no delay in the progress of the Company's work.

Section 4. The obligation of the Company under its franchise to indemnify the City against claims for damages arising out of the construction or management of its tracks and roads shall continue as to any portion of the Company's tracks and right-of-way until the work of the Company on that particular portion is completed and approved by the City Engineer, and until discontinuance of streetcar service thereon is authorized by the City.

Section 5. Where in the judgment of the City Engineer it is necessary to remove ties, such removal shall be made by the City. On such portions of the track and right-of-way that the City Engineer determines that the old paving shall be removed and that portion of the street repaved, the Company shall have no obligation in respect to preparation of the street for the paving.

Section 6. Where the tracks of the Company cross railroads, the Company will remove and restore the crossings at those locations where the Company has the obligation of control of the crossings and is responsible to the railroad company therefor. At other crossings, where the crossings were established by and are the responsibility of the railroad company, the Company shall have no responsibility. On railroad bridges, owned by railroad companies,

the rails and the paving of the Company's right-of-way shall become the property of the City.

The rails on the Bryant Avenue Bridge, across Minnehaha Creek, and on the Bryant Avenue streetcar line, shall be removed by the Company within thirty (30) days after the discontinuance of the street railway operations thereon, and the ends of the bridge barricaded.

Section 7. Unpaved streets occupied by the tracks of the Company are not included in the calculation of miles of the Company's lines covered by this ordinance. The Company agrees to remove the rails and ties from the unpaved streets. The Company may make this removal on unpaved streets at any time after April 1, 1954, upon notifying the City Engineer of its intention so to do; and it shall make such removal within sixty days after notice from the City's Engineer to do so. The Company agrees to backfill the street to established grade with suitable additional material. The obligation of the Company to backfill shall be limited to a cost of $5,000 for labor and material, and if the cost to the Company exceeds that amount, the City Engineer shall be immediately notified, and unless the City Engineer elects otherwise, the Company shall complete the backfill and credit the expense in excess of $5,000 to future payments to be made under the terms of this ordinance. The obligation of the Company under its franchise to indemnify the City against claims for damages arising out of the construction or management of its tracks and roads shall continue as to the portion of the Company's tracks and right-of-way on unpaved streets until the removal of the tracks and ties and backfill are completed and approved by the City Engineer. As the work is completed and approved on any portion of said streets, the

Company's liability under this indemnity provision shall cease.

Section 8. On or before December 1, 1953, the Company shall furnish a quit-claim deed to the City of all the right, title and interest of the Minneapolis & St. Paul Suburban Railroad Company to the private right-of-way known as the Lake Harriet right-of-way, extending from Irving Avenue south and 31st street to 44th street and France avenue south, in the City of Minneapolis, upon which said line is now being operated. This deed shall provide that the Company may retain possession of the right-of-way and shall have the right to continue to operate its streetcars thereon until discontinuance is requested by the Company and authorized by the City. Upon discontinuance, the streetcar rails, the power station, underground ducts, electrical transmission cables in ducts, trolley wire and appurtenances, including poles, transmission line tunnels, and the terminal buildings at the several car stops shall remain the property of the Company; and the Company shall remove all of them, except underground ducts, within ninety (90) days after such discontinuance. If not so removed, this property, except underground ducts, may, at the option of the City, be removed, at the expense of the Company, or, at the City's option, shall become the property of the City.

Section 9. It is contemplated by the City and the Company that the discontinuance of all streetcar operation and the conversion of the streetcar lines to buses shall be completed in the year 1954. If any of the lines are not discontinued in the year 1954, the mileage of those lines shall be deducted from the miles of lines for which it is provided in this ordinance the Company shall make payment, and

the obligation of the Company for payment shall be reduced accordingly. At any time thereafter that the Company applies for discontinuance of such lines, and such discontinuance is approved by the City, the miles of the discontinued lines shall then again be added to the number of miles for which the Company is to make payment and its obligation increased accordingly. The monthly payments, hereinafter provided for, which shall accrue after such decrease or increase in mileage, shall be decreased or increased proportionately so that the total obligation of the Company shall be paid within the ten (10) years hereafter specified.

Section 10. Except as otherwise provided in this ordinance, the rails, paving, ties and materials of the Company in the streets which are not removed by the Company as a part of the work provided for in this ordinance shall become the property of the City. Together with the resolution of the Board of Directors of the Company provided for in Sections 14 and 17 of this ordinance, the Company shall furnish to the City a statement in writing from the Northwestern National Bank of Minneapolis, as trustee, or from its attorney that the requirements of the trust deed in respect to the transfer to the City of the property of the Company, as provided for in this section, and as to the transfer or surrender of other rights or interests in the rails, ties and right-of-way of the Company, as provided for in this ordinance, have been complied with. The Company shall retain title to all underground duct lines and cables in same, tunnels and cables in same, trolley poles, overhead feeder cables and trolley wire and appurtenances, duct line and tunnel manholes, in effect, the electrical transmission system complete.

Section 11. If for thirty (30) days after request by the City Engineer the Company fails to perform any portion of the work provided for in this ordinance, that work shall be done by the City Engineer and the expense thereof shall be charged to the Company, unless by reason of weather conditions and the elements this period of time is unreasonably short, in which event the time may be extended by the City Engineer.

Section 12. The sums of money to be paid by the Company under the terms of this ordinance shall be made in consecutive monthly payments, the first payment to be made December 1, 1953, said monthly payments to continue for a period of eight (8) years until the full sum has been paid. The monthly payments for the first six years shall each be in the sum of $7,690.00, and the monthly payments for the last two years, viz.; commencing December 1, 1959, shall each be in the sum of $15,380.00, except the last monthly payment shall be in the sum of $15,370.00. The obligation to make these monthly payments shall be evidenced by a series of 96 negotiable promissory notes, one maturing each month for a period of eight (8) years commencing December 1, 1953, each of said notes to be respectively in the principal amount above set forth. These promissory notes shall carry no interest until the maturity of each payment. In case of default of any payment the Company shall be obligated to pay to the City six per cent (6%) interest on the defaulted payment from the time of the default. In case default in one or more payments continues for more than three (3) months, the City may declare the entire unpaid balance immediately due and payable. Each note shall be duly executed in behalf of the Company by its duly authorized officers. Neither Twin City Rapid Transit Co. nor Minneapolis Street

Railway Company shall pay any dividends on the stock of either company if and as long as the companies are in default in the payment of any of the monthly payments imposed upon them by the provisions of this Section 12 hereinabove set forth, the same being represented by the Promissory notes due monthly all as hereinbefore set forth.

Section 13. The Company shall furnish and deposit with the City Treasurer negotiable government bonds or securities of equal value in the sum of $120,000, the deposit to be made upon the condition that if the Company is in default in the payment of the sums of money, or in the performance of the work, or the carrying out of the other obligations of the Company under this ordinance, the City may sell said bonds or securities and apply the proceeds against the obligations of the Company to the City. Such sale and application shall not be considered as removing the default unless and until the Company restores the securities to the full amount. So long as the Company is not in default in the performance of any of its obligations under this ordinance, it shall have the right, and the City shall give it the opportunity, to clip the coupons and receive the interest on the bonds or other securities on deposit with the City.

In addition to the deposit of bonds or securities, the Company agrees that the Twin City Rapid Transit Company shall guarantee the payment of the sums of money and the carrying out of the other obligations of the Company under this ordinance, and shall make this guaranty by filing with the City Clerk of the City its written acceptance of the ordinance and the conditions thereof, accompanied by a certified copy of a resolution of the Board of Directors of the Company authorizing such acceptance and such guaranty.

The company shall continue to furnish the City monthly financial statements, as has been its practice.

Section 14. This ordinance shall become binding upon the Company upon the Company's filing with the City Clerk of the City of Minneapolis its written acceptance of the ordinance and the conditions thereof, accompanied by a certified copy of a resolution of the Board of Directors of the Company, authorizing such acceptance, and the furnishing of the security provided for in the preceding section.

Section 15. Upon acceptance of this ordinance by the Company and the payment in full to the City of the sum of $922,790 as provided herein, the Company shall be released from all of its obligations under the franchise ordinances of 1875 and 1890 as to paving and maintaining of streets, snow and ice removal, street cleaning and flushing, and sanding, and its obligation to indemnify the City, and from all other obligations imposed by existing ordinance or resolution, on all of the streets and streetcar lines where street railway operation has been discontinued by authority of the City Council. So long as the Company is not in default in any of its monthly payments under this ordinance, its obligations under previously existing ordinances and resolutions as enumerated in the preceding sentence shall be suspended, except as otherwise provided specifically in this ordinance, as to each streetcar line as the service on such line is discontinued with the consent of the City; and as the Company completes the work to be performed by it under Section 3 of this ordinance, on any portion of its discontinued lines, to the satisfaction of the City Engineer, it shall be fully released from its obligations under said previously existing ordinances and resolutions

in respect to those portions of its street railway where said work has been completed.

Section 16. The City Council of the City of Minneapolis shall not hereafter authorize the discontinuance of any of the Company's street railway lines, or any portion thereof, except following acceptance by the Company of the terms of this ordinance nor so long as the Company shall be in default in carrying out any of the provisions of this ordinance; and the City Council of the City of Minneapolis shall not hereafter approve of the operation of buses on any streetcar routes until authority for the discontinuance of operation of streetcars on those routes has been granted, except by amendment with specific reference to this section of this ordinance.

Section 17. The Company shall procure such approval, if any, as is required by law, of this ordinance, and the Company's obligations to make payments thereunder. The Company, through its Board of Directors, shall adopt a resolution as prescribed in Article VI, Section 6.2 of the Mortgage and Deed of Trust from the Company to the Northwestern National Bank of Minneapolis, as Trustee, dated October 1, 1944, and shall furnish copies of said resolution to the Trustee and to the City; and the Company shall procure such other agreement or consent to the provisions of this ordinance from other mortgagees, lien holders or creditors as may be required by any agreement between them and the Company.

Section 18. The approval and authority for the operation of motor bus service by the Company and the discontinuance of streetcar service upon the following lines: Minneapolis portion of Minneapolis-St. Paul line, Fort Snelling-Minnehaha line, Plymouth-East 25th Street line,

Bryant-Johnson line, Selby-Lake line and Chicago-Penn-Fremont line, as provided for in ordinances passed by the City Council relative thereto on October 30, 1953, are given upon compliance with the terms and conditions of the ordinance of October [3]0, 1953, entitled "An Ordinance to provide for the paving, surfacing and restoration of the City streets on the Minneapolis Street Railway Company right-of-way by the City of Minneapolis and the Minneapolis Street Railway Company, and the payment by the Minneapolis Street Railway Company for said work as a condition to the discontinuance of streetcar service on lines in the City of Minneapolis," as hereby amended, and compliance with said ordinance as originally passed shall not be required.

Passed October 30, 1953, W. Glen Wallace, President of the Council

Approved October 30, 1953, Eric G. Hoyer, Mayor

Attest: Imogene M. Clay, Assistant City Clerk.

As amended November 27, 1953.

APPENDIX

Removal Contract between the Transit Company and American Iron

A. Contract of February 11, 1952 *

THIS AGREEMENT, made and entered into this 11th day of February, 1952, by and between American Iron & Supply Co., a corporation, of Minneapolis, Minnesota, hereinafter referred to as "Contractor," and The Transit Supply Company, a corporation, of Minneapolis, Minnesota, acting as agent for Minneapolis Street Railway Company, The St. Paul City Railway Company, and Minneapolis & St. Paul Suburban Railway Company, hereinafter called "Railway,"

WITNESSETH:

That it is mutually agreed by and between the parties:

1. Contractor shall remove railway tracks, overhead wires, poles, ties and other appurtenances belonging to the Railway from and along the lines hereinafter designated, and shall restore the paving and public property to conform to adjacent conditions where such tracks, wires, poles, ties and other appurtenances are removed.

This contract is entire, and performance of each and every item thereof is required as to track, overhead wires, ties, poles and appurtenances upon and along the following streets or locations:

a. West Broadway from Penn Avenue North to Xerxes Avenue North

* Each of the nine lines or portions of lines specified in this contract were located in Minneapolis except the Mahtomedi line ("G" Par. "1") which had in fact been removed shortly before February 11, 1952 (Vol. 27, pp. 66-7; Vol. 69, pp. 35-6).

b. Morgan Avenue North from West Broadway

c. 19th Avenue North from Morgan Avenue North to Upton Avenue North

d. 35th Street from Cedar Avenue to 23rd Avenue South

e. 23rd Avenue South from 35th Street to 38th Street

f. 38th Street from 23rd Avenue South to 28th Avenue South

g. Suburban line extending from Hyacinth wye in the City of St. Paul through North St. Paul, Wilernie and terminating at the Village of Mahtomedi wye.

h. 28th Avenue South from 38th Street to Minnehaha Parkway

i. East Hennepin Avenue from Johnson Street to Stinson Boulevard

2. Contractor will perform each and all operations in a careful and workmanlike manner satisfactory to Railway. To assist in avoiding breakage and damage regarding removal and handling of all special work, frogs, mates, switch boxes and controls, Contractor always will follow instructions of representatives of Railway until all such special work as specified from time to time is removed and disposed of in accordance herewith.

3. The Contractor will resurface and restore all portions of roadways and streets from which said Railway equipment is removed to conform with adjacent and surrounding surfaces in durability, finish and quality, and as required by all City Ordinances and satisfactory to the City Engineer, other public authorities, and Railway engineer in which the operations are performed.

4. Before Contractor may start any operations, Railway will provide a descriptive sketch for each of the locations, which by reference immediately shall become an integral part of this contract, the same as though now included verbatim herein.

5. As full compensation to be paid to the Contractor by the Railway under this contract, the Contractor shall receive from the Railway all of the materials which it removes as herein specified, except such as Railway desires to keep in accordance with the descriptive sketches and specifications, and clear and full title to all such removed materials as Railway does not designate that it wishes to keep shall pass to Contractor immediately upon removal and at the location thereof, the same as though formal bills of sale were executed and delivered to Contractor for all such removed materials. In the event the Railway exercises its right to keep any of said materials, it agrees to pay the Contractor the market value of such scrap materials retained or reimburse it with a like amount of other suitable scrap. The Contractor shall comply with National Production Authority order M-64.

6. Railway reserves the option to retain such rail as it may select. The Contractor shall, nevertheless, remove the same and shall be reimbursed by a like amount of scrap rail or other suitable scrap.

7. Railway reserves the option to remove and retain any special work, frogs, mates, switches and crossovers, and if this option is exercised, the Railway engineer shall designate such items at the time when removal operations at any location are about to be commenced. If Railway exercises this option relating to the foregoing described items, it will resurface and restore such portion of the

roadways and streets from which said items have been removed and the Contractor shall be relieved from doing so.

8. Contractor has made and will perform this contract expressly as an independent contractor and assumes all authority, control, direction, liability and supervision over equipment, means, methods and men employed, and each and every share of operations undertaken from time to time hereunder. Railway reserves merely and only the right to determine whether or not breakage and damage to any of its property may be prevented and whether or not the final results are satisfactory to Railway and to interested governmental, municipal and public authorities.

9. Contractor also accepts and assumes entire liability, whether actual or threatened, that may or does result under all ordinances, laws and statutes, and by whomsoever advanced or asserted, and indemnifies, will defend and will hold Railway harmless forever against any and all Workmen's Compensation liability and all other claims, demands, expenses and suits for all damages and injuries, and will reimburse Railway pursuant to all commission orders, and court decisions, and for all costs, expenses, judgments, liabilities and losses of all kinds by reason of all thereof. Throughout the entire operations and until completion thereof, Contractor shall maintain such safety barriers, wood blocks and barricades as are necessary for the safety of the public, and do everything in a manner calculated to avoid accidents, injuries and damages insofar as is reasonably possible.

Contractor further agrees to comply with all applicable, established and publicly promulgated and published ordinances, laws, regulations and statutes, and will save Railway harmless from any charge of violation thereof and any

penalty thereunder on account of any of Contractor's operations pursuant hereto.

10. This contract contains the entire agreement and contract covering all such operations, and it may not be changed or modified in any manner except by mutual assent thereto in writing, signed respectively by qualified officers or other duly authorized representatives of Contractor and of Railway.

11. As further consideration for the above undertakings on the part of the Contractor the Railway agrees that it will give the Contractor first option to purchase all of its other scrap materials at the then established ceiling price. Whenever any of such scrap is available for sale, the Contractor shall be notified and it shall indicate its desire to purchase said scrap material at the then established ceiling price within a period of ten (10) days.

12. In all instances Contractor will await specific authorization and consent from Railway as to the time when any and all operations hereunder may be started, continued and completed, and Contractor will comply therewith.

13. It is contemplated that all operations under this contract shall be completed prior to December 31, 1952. If Contractor has fully performed all obligations and undertakings in a manner acceptable to the Railway and interested public authorities, this contract shall be considered as completed, except for the indemnity against claims provisions hereof. This contract, however, may be extended by mutual consent of the parties for an additional period of one or more years to cover such projects as Railway may designate during such extension.

IN WITNESS WHEREOF Contractor and Railway, by their respective duly authorized officers, have caused this agreement to be duly executed the day and year first above written.

AMERICAN IRON & SUPPLY CO.
By *H. A. Isaacs*
Its *Pres.*
By *Fred Isaacs*
Its *Sec.*

In Presence Of:

Mary H. Larsen

David E. Ellison

THE TRANSIT SUPPLY COMPANY
By *Fred A. Ossanna*
Its *President*
By *James H. Towey*
Its *Sec. & Treas.*

B. First Addendum to Contract of February 11, 1952 **

It is agreed between the undersigned that the following streets or locations shall be included under Paragraph 1. of said contract dated February 11, 1952:

Randolph Line - Open track from Hyacinth Wye to East 7th Street and Van Dyke Avenue. East 7th Street from Van Dyke Avenue to Mississippi Street. Randolph Avenue from West 7th Street to Cleveland Avenue. Cleveland Avenue from Randolph Street to Ford Road. Ford Road from Cleveland Avenue to Ford Loop.

Ft. Snelling - Maria Line - Ft. Snelling Bridge not included. West 7th Street from Ft. Snelling Bridge to 4th Street West. Maria Avenue from East 7th Street to Hudson Road. Hudson Road from Maria Avenue

** Each of the seven lines or portions of lines specified in this addendum were located in St. Paul; the City of St. Paul did not then require repaving where tracks were removed in paved streets. (Vol. 50, pp. 223; Vol. 69, p. 37).

to Earl Street. Earl Street from Hudson Road to Burns Street. Burns Street from Earl Street to English Street.

Rice Street - South St. Paul Line - Rice Street from Ivy Avenue to Como Avenue. Robert Street from 4th Street East to Concord Street. Concord Street from Robert Street to Annapolis Street (City Limits). Concord Street from Annapolis Street to Linden Street (South St. Paul).

St. Clair - Phalen Line - St. Clair Avenue from Cleveland Avenue to West 7th Street. Lafayette Road from East 7th Street to Collins Avenue. Collins Avenue from Lafayette Road to Burr Street. Burr Street from Collins Avenue to Minnehaha Avenue. Minnehaha Avenue from Burr Street to Payne Avenue. Payne Avenue from Minnehaha Avenue to York Avenue. York Avenue from Payne Avenue to Greenbrier Street. Greenbrier Street from York Avenue to Maryland Avenue. Maryland Avenue from Greenbrier Street to Forest Street. Forest Street from Maryland Avenue to Phalen Park Phalen Park Right of way.

Grand - Mississippi Line - Grand Avenue from Cretin Avenue to Oakland Avenue. Oakland Avenue from Grand Avenue to Ramsey Street. Ramsey Street from Oakland Avenue to West 7th Street. Mississippi Street from East 7th Street to York Avenue. York Avenue from Mississippi Street to Westminister Street. Westminister Street from York Avenue to Case Avenue. Case Avenue rom Westminister Street to Arkwright Street. Arkwright Street from Case Avenue to Brainerd Avenue. Brainerd Avenue from Arkwright Street to Ivy Avenue. Ivy Avenue from Brainerd Avenue to Payne Avenue. Payne Avenue from Ivy Avenue to Nebraska Avenue.

Hamline - Cherokee Heights Line - Prior Avenue from University Avenue to Minnehaha Avenue. Minnehaha Avenue from Prior Avenue to Hamline Avenue. Hamline Avenue from Minnehaha Avenue to Thomas Avenue. Thomas Avenue from Hamline Avenue to Como Avenue. Wabasha Street from 4th Street to Winifred Street. Winifred Street from Wabasha Street to Ohio Street. Ohio Street from Winifred Street to George Street. George Street from Ohio Street to Smith Avenue. Smith Avenue from George Street to Annapolis Street.

Snelling Crosstown Line - Snelling Avenue from Highland Parkway to Selby Avenue. Pascal Avenue from Como Avenue to Arlington Street. Arlington Street from Pascal Avenue to Hamline Avenue. Hamline Avenue from Arlington Street to Hoyt Avenue.

It is understood that insofar as the above added seven (7) lines are concerned, the Contractor shall not be bound to repave any of said streets, provided, however, that after the removal of said track, he shall leave all of said streets in a condition usable for traffic. If any unusual situation arises in the work on any of said foregoing streets, the same shall be subject to negotiation between the Contractor and the Railway.

AMERICAN IRON & SUPPLY CO.
By *H. A. Isaacs*
Its *Pres.*
By *Fred Isaacs*
Its *Sec.*

In Presence Of:

M. H. Larsen

L. L. Balich

THE TRANSIT SUPPLY COMPANY
By *Fred A. Ossanna*
Its *President*
By *James H. Towey*
Its *Sec. & Treas.*

C. The Second Addendum to Contract of February 11, 1952

It is agreed that American Iron & Supply Company shall complete the removal of railways tracks, overhead wires, poles, ties and other appurtenances belonging to the Railway from and along the lines of Minneapolis Street Railway Company, The St. Paul City Railway Company and Minneapolis and St. Paul Suburban Railway Company, as set forth in contract dated February 11, 1952 and first addendum signed August 13, 1952.

It is further agreed that American Iron & Supply Company shall remove railway tracks, overhead wires, poles, ties and other appurtenances belonging to the Railway from and along the remaining lines of Minneapolis Street Railway Company, The St. Paul City Railway Company and Minneapolis and St. Paul Suburban Railway Company, as directed by the Railway, until complete conversion and removal of all of the above is effected. On the lines which are not paved, American Iron & Supply Company shall leave all such streets in a condition usable for traffic.

All of the above streets or locations shall be included under paragraph 1. of said contract dated February 11, 1952.

In addition to the lines of said Railway, as described above, covered by the original agreement of February 11, 1952, first addendum signed August 13, 1952 and this addendum, removal of machinery, structures, and miscellaneous items and appurtenances on property of Railway at Nicollet and 31st Street, No. 1 Garage on Currie Avenue, Washington and 24-26 Avenues North garage, all in Minneapolis, and property known as Snelling Yards, in

St. Paul, together with removal of underground cables and hauling of any of the above, shall be included under paragraph 1. of said contract dated February 11, 1952.

All of the provisions of the original contract of February 11, 1952 shall apply to this addendum.

Dated this 2nd day of January, 1953.

AMERICAN IRON & SUPPLY CO.
By *H. H. Isaacs*
Its *Pres.*
By *Fred Isaacs*
Its *Sec.*

In Presence Of:

B. W. Lund

Vicki Fay

THE TRANSIT SUPPLY COMPANY
By *Fred A: Ossanna*
Its *President*
By *James H. Towey*
Its *Sec. & Treas.*

APPENDIX

Judgments of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,656, September Term, 1961

HARRY H. ISAACS,

Appellant.

vs.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the ———— District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the ———— District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Harry H. Isaacs, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

March 22, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,655, September Term, 1961.

FRED ISAACS,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the ———— District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the ———— District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Fred Isaacs, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

March 22, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,662, September Term, 1961.

FRED A. OSSANNA,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the ——— District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the ——— District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Fred A. Ossanna, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

March 22, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,663, September Term, 1961.

BENSON M. LARRICK,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the ———— District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the ———— District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Benson M. Larrick, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

March 22, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 16,669. September Term, 1961.

EARL A. JEFFORDS,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the ———— District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the ———— District of Minnesota, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Earl A. Jeffords, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

March 22, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

APPENDIX

Order of the Court Below Denying Petitions for Rehearing

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1961.

No. 16,655

Fred Isaacs, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

No. 16,656

Harry H. Isaacs, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

No. 16,662

Fred A. Ossanna, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

No. 16,663

Benson M. Larrick, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

No. 16,669

Earl A. Jeffords, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

Petitions of appellants for rehearing filed in these causes having been considered, it is now here ordered by this Court that the same be, and they are hereby, denied.

April 20, 1962.

APPENDIX

Order of Associate Justice Byron R. White Extending Time for Filing of Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1961

FRED ISAACS, ET AL.,

Petitioners,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 19, 1962.

Dated this 1st day of May, 1962.

BYRON R. WHITE,
Associate Justice of the Supreme Court of the United States.

APPENDIX

Portions of the District Court's instructions relating to the Minneapolis Conversion Ordinance of October 30, 1953.

"It is the Government's contention that, to all intent and purposes, the contract of February 11, 1952, and the addenda thereto, were abandoned, and in pursuance of the scheme to defraud, American was relieved of its obligation to do any paving by the arrangement allegedly made by the defendant Ossanna in fostering the City Ordinance of October 30, 1953, which, according to the Government, in effect relieved American of its obligation to remove the tracks and to repave where necessary; that in order to be relieved of the obligations of rail removal and repaving which American had assumed under the February 11, 1952, contract and its addenda, together with being relieved of snow removal and sanding of streets, and so forth, and other provisions of the franchise, the ordinance provided that Transit was required to pay to the City of Minneapolis some $900,000, plus a sum not to exceed $300,000 to reimburse the city for the special work which it was required to perform.

"It is the Government's position, therefore, that American never did sustain any losses in the handling of Transit's overhead scrap, and that any projected losses, if it had performed its contract, is, according to the Government, merely hypothetical, in that by the passage of the ordinance, it was the scheme and plan of one or more of the defendants to place American in a position whereby it would be relieved of the burden of its contract to remove tracks and repave where necessary, * * *." (V. 69, pp. 39-40)

"The contracts, members of the jury, as written constituted valid covenants binding upon the parties.

"Well, what about their performance? Did American proceed in good faith to carry out its agreements with respect to the removal of rails and repaving? American contends it lost heavily on removal [of] rail, primarily because of concrete adhering thereto, the expense of removal, the preparing the rails for scrap, repaving, together with the then low price of scrap steel, and that these conditions brought about a substantial loss to it and that if it had been required to go forward according to the terms of its contract, it would have lost some $900,000.

"The Government contends on the other hand, that American sold all the rail, overhead wire, feeder cable, and a substantial number of the poles as scrap, and did not lose any money in removing and disposing of this material. The Government contends that the parties never intended in good faith to go forward *with the contracts* according to their terms regarding the demolition of the system, but that the handling of the scrap with no supervision or control by Transit employees, and with the relieving of American of its obligation to remove the rails and to repave by the Minneapolis City Ordinance, and granting to American the underground cable at prices far below its market value, establish, according to the Government, that there had been conceived in the minds of one or more of these defendants, the plan to loot and plunder the Transit Company of its assets as charged in the indictment." (V. 69, pp. 88-9)

"What about the ordinance passed by the City of Minneapolis to relieve the streetcar company of its duty to remove tracks and repave and the other obligations which

the streetcar company had under its franchise? Was that a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract, Government's Exhibit BZ? Or did American in good faith indicate its willingness to go forward with its obligations under this contract?" (V. 69, pp. 137-8).